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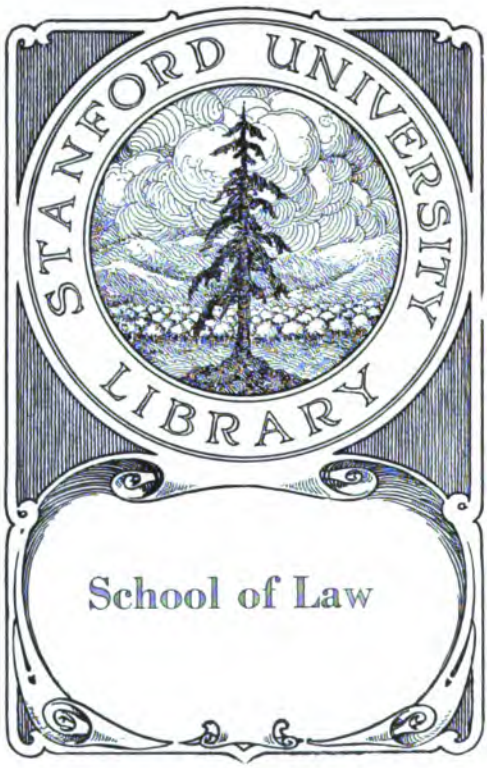
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DIARY FOR JANUARY.

1. Sat.....New Year's Day. Christmas vac. in Ct. of Ap. ends.
2. Sun.....2nd Sunday after Christmas.
3. Mon...Heir and Dev. sitt.. and Co. Ct. Terms begin.
6. Thurs..Christmas vacation in Chancery ends,
8. Sat.....Christmas vac. in Exch. Ct. ends. Co. Ct. Term ends.
9. Sun.....1st Sunday after Epiphany.
12. Tues..Court of Appeal Sittings begin.
16. Sun.....2nd Sunday after Epiphany.
18. Tues..Heir and Dev. sitt. ends. Second Intermedt'e Exam.
19. Wed...Second Intermediate Examination.
20. Thurs..First Intermediate Examination.
21. Fri.....First Intermediate Examination.
23. Sun.....3rd Sunday after Epiphany.
25. Tues..Primary Examination.
26. Wed...Primary Examination.
27. Thurs..Primary Examination.
28. Fri.....Final Examination.
29. Sat.....Final Examination.
30. Sun.....4th Sunday after Epiphany.

TORONTO, JANUARY 1st, 1881.

The attention of our readers is called to the publishers' notice which appears on the cover. We think they will agree that the LAW JOURNAL, now in its twenty-seventh year, has taken a new lease of life. On this the first day of January, 1881, and at the beginning of another series, we wish our friends, old and new, a Happy New Year.

Sir James William Colville, one of the paid Judges of the Judicial Committee of the Privy Council, died last month at the age of 70. He commenced his professional career as an Equity draughtsman in England, but afterwards went to India and became Chief Justice of the Supreme Court of Calcutta.

Two new law books are announced, one by Mr. Stephens, author of the Quebec Law Digest, on the law and practice of joint stock companies, under the Canadian Acts. The other is by Mr. Kehoe, of the Ontario Bar, on the law of choses in action. Both subjects are important, and if well treated cannot fail to receive a hearty welcome at the hands of the profession in this Province.

In the recently published memoirs of Panizzi, the Librarian of the British Museum, we notice a letter of the Rev. William Shepherd, relative to attorneys' charges during elections, which is worth reproducing: "A scamp of an attorney, who thrust himself into some trifling employment in Sir Francis Burdett's celebrated contest for Middlesex, on sending him his bill, after charging for a journey to Acton, and another to Ealing, &c., &c., closed with the following item—'To extraordinary mental anxiety on your account, £500.'"

In the English legal periodicals we observe that "a gentleman" publishes a card to the effect that he is "prepared to undertake the getting up of evidence and the obtaining of reliable information in any litigious matter of importance." As a recommendation of himself for this sort of work, he further informs the public that he has "very *exceptionable* facilities for obtaining information." In his exceptional desire to use long words, he has failed to frame an unexceptionable advertisement. We notice a similar blunder in the use of this word, at the end of the judgment in *Waddell* v. *Smyth*, 3 Ch. Cham. 413 which may safely be attributed to the reporter.

The well-known case of *Angus* v. *Dalton* is slowly moving onwards in the House of Lords. The practice, which has for some time been neglected, of summoning the judges to advise the House, is to be revived in this appeal. It is said that Sir George Jessel and two of the Vice-Chancellors are to be summoned for that purpose. The result of this case will be watched with much interest. Few more remarkable examples can be found of judicial divergence

than are presented in the various judgments of the many judges who have passed upon the questions of lateral support involved in this case.

Some little caution is required when dealing with growing crops, as certain mortgagees found to their cost in the case of *Re Phillips* (L. J. notes, p. 130.) By a bill of a sale a farmer mortgaged to a bank his furniture, growing crops, etc, The bill of sale was not registered. The farmer became insolvent and a trustee was appointed to his estate. The bank claimed to seize some of the crops which had been cut and stacked. This claim the trustee disputed, on the ground of the non-registration of the bill of sale. The decision was in favour of the trustee, the Court on appeal saying that growing crops, being an interest in land, passed with the land by the deed; and the deed conveying them did not require registration. The mortgagor being left in possession, the rents and profits of the land, by the ordinary law, belonged to him; and he was justified in cutting the crops. But when the crops were cut and severed, they then became chattels · and to entitle the bank to claim then in that character, the deed should have been registered; but, not having been so registered, was void as against the trustee.

Law Reformers are as busy in England projecting their plans as is Attorney-General Mowat. One of their manifestoes which we have noticed is much more attractive reading than the "Proposed Judicature Bill printed for consideration only," which has been lately sent round to the professional public of Ontario. The English pamphleteer refers to the inquiry had two sessions ago before the committee on land titles and transfers, whereat was thoroughly exposed and reprobated the base fee, that monstrous off-spring of the estate tail. He then observes that its subtle and mischievous working has been exhibited more lucidly and artistically than he can hope to do in the pages of "Felix Holt."

It is proposed to assimilate freehold with leasehold tenure. The suggestion is to convert the fee simple of land unsettled at the passing of the Act into a term of 10,000 years; and a contemporary remarks, that the gentleman who drafted the bill, "with a happy assertion of permanence for his work, is careful to provide that the term on its expiration shall be renewed." By this one stroke the draftsman would abolish primogeniture, put real estate on death in the hands of the personal representative, and abolish entails. The *Law Journal* continues:—"To foresee all the results, or even all the important results, of turning realty into personalty requires a comprehensive grasp of the situation, of which we imagine no human brain is capable. Even lawyers shrink from such a leap in the dark; and it can hardly be expected that the Legislature, even if it desires the obvious changes intended, will commit itself to so sweeping a proposition, the effect of which is confessed to be beyond conception."

It is also proposed to abolish the Statute of Uses, which the Duke of Norfolk (*temp.* Hen. VIII) declared to be the worst act ever passed. Then is suggested the remodelling of the present modes of limitation of estates and abolishing the *habendum*, which is not only clumsy but ungrammatical, in consequence of a time-honored mistranslation from the Latin, produced by ignorance of the force in that language of the dative used as an ablative. Thus the Latin form would be a conveyance of "*unum messuagium Johanni habendum predicto Johanni*," which last three words ought to have been rendered into "to be held by the said John," but have been absurdly turned into "to hold to the said John." To treat the "*habendum*" after this fashion is almost as shocking in its way as was the flippancy of that gentleman who, according to Sidney Smith, spoke disrespectfully of the North Pole.

UNLICENSED CONVEYANCERS.

We are pleased to know that our exertions on behalf of our brethren in the country who are afflicted with a plague, not of locusts, but of something almost as numerous, and, in their way, quite as destructive, to wit, "unlicensed conveyancers," is fully appreciated. We have before us two letters on the subject, one of which we publish on another page. The other must stand over until next issue. The writer says: "I am glad to see that we have a staunch friend in your paper." He certainly has, and we only hope that our efforts will some day help to place matters on a proper footing. We should recommend our friends to take united action at once, and bring pressure to bear upon their representatives in the Local Legislature, so that the hands of the Attorney-General may be strengthened to give some measure of relief to those whom he must feel have been cruelly wronged.

JURISDICTION OF DIVISION COURTS.

We are indebted to our valued correspondent "R" for the following note of a case which lately came before Judge Ardagh, in the county of Simcoe, in which an amount exceeding $100, upon an open account, was sought to be recovered. No objection to the jurisdiction had been filed by the defendant, and it was contended for the plaintiff, that the case could therefore be tried, as in the absence of the necessary notice, defendant was now precluded from objecting to the jurisdiction. High authority was quoted in support of this view, but the judge held that such an interpretation of the Act was not warranted, and he refused to try the case. His reasons, shortly, were, that the sections in question were only intended to cover a case entered in the wrong division, that the jurisdiction spoken of in section 4 was one of *place*, and not of amount, and that no consent, or rather absence of objection, could confer upon the Court a jurisdiction beyond that prescribed for it by Act of Parliament. He considered also that the words in section 10, "any suit without the jurisdiction of the Division Court," extended by necessary implication to section 14; and that this section 14 was intended only as a modification of section 62, of the D. C. Act, and not in any way intended to override sections 54 and 56 of the same Act. We shall refer to this case at further length in our next issue.

LEGAL LEGISLATION.

We shall shortly have two mills hard at work manufacturing laws for this much-governed and much-legislated-for people of Canada.

The measure of most interest to the profession in this Province will, of course, be the Judicature Bill. We are compelled to defer any remarks we have to make upon it until next issue. It was, however, discussed at some length in these columns (16 C. L. J. 45), when introduced a year ago. It was then urged upon the Attorney-General to let it lie over for further consideration. This course was adopted and has doubtless borne good fruit, as numerous suggestions have been made, some of which have been drafted into the proposed Act.

In the Dominion Parliament the Government promise to bring in measures for the winding up of insolvent banks and incorporated companies, for the improvement in certain respects of the criminal law and in reference to railway legislation. The Minister of Justice gives notice of a bill to provide for the salaries of two additional judges in Quebec. The following bills have been introduced: A bill to abolish the Supreme Court; a bill to amend the law respecting documentary evidence in relation to public proclamations, &c., and an Act for the better prevention of fraud in relation to contracts involving the expenditure of public moneys.

An enquiry has been placed upon the paper as to whether the Government intend to bring in any measure for the relief of

Insolvents or for the disposition of their estates.

Mr. Blake asked for a statement as to the retiring allowances of the judges in the different Provinces, and for copies of the Orders in Council and correspondence affecting the appointment of the two new judges in British Columbia.

COUNTY JUDGES AND THE PUBLIC SCHOOL ACT.

The Law Journal once spoke of the Ontario County Judge as "the jurisprudential servant of all works," and the remark was strikingly correct. Numerous judicial duties are assigned to him by statute in connection with our Municipal and School systems and otherwise. In some cases the Judge is empowered to act alone—in some cases other persons are associated with him.

Forms are not provided under any of the statutes referred to, and almost nothing prescribed in the way of a detailed procedure. This casts much responsibility on the practitioner as well as on the Judge, and leads to a divergence in practice very embarrassing to the lawyer employed to promote and conduct a statutory appeal. If cases were reported to the Law Journal shewing what had been done by experienced County Judges, it would, it is believed, be a great assistance to all concerned in local administration, and hence this brief note of two cases under the Public School Act which came before the learned senior Judge of the County of Simcoe in December last.

It may be observed the Public School Act confers large powers upon municipal corporations for the establishment and alteration of school sections. These powers are sometimes exercised without due consideration. Action may be stimulated by improper motives—local or individual pressure may be brought to bear, or there may be a plain error in judgment, and what is not in the best interests of education, or is palpably unjust, may be the result, or the same motives may prevail, preventing any action. To remedy this the School Act provides (sect. 88), that a complaint in the nature of an appeal may be made to the County Council, which is empowered to call into existence a tribunal of appeal having power finally to deal with the question. That is, they appoint one, two, or three persons to act in conjunction with two others, "the County Judge and a County Inspector," named in the statute. In practice the County Council of the County of Simcoe and some other counties only appoint one person, and it is certainly a better and less expensive mode that the tribunal should be composed of three persons only.

In the two cases referred to, the practice followed was this: The judge called a meeting of the body, and they settled the day of public meeting, and in the meantime issued notices thereof to the parties concerned, and directed also that the Reeve of the municipality by which the by-law was passed, should appear before them on the day named. The map of the municipality shewing the school sections, and returns shewing the assessed values of the lands affected, the number of children of school age resident in the localities affected, and the average attendance at the schools, etc., were called for.

On the day appointed, the three members of the tribunal (committee) met in open court in the Court House, Barrie, and the Judge declared the enquiry open, and called upon the appellants or complainants to make their statement. Afterwards the parties on the other side were heard. The Reeve of the township was also heard, and the Judge announced that they desired to hear any other person present who wished to make any statement or give any information to them, and one or two ratepayers were heard.

The complainants in one case were represented by counsel, Mr. Pepler, of Barrie, and one or two questions were raised by him of some importance. The first was whether evidence should be taken on oath. The Judge declined to receive evidence on oath as no

power to administer an oath was expressly given; and moreover he did not think evidence of this kind contemplated—that the committee, no doubt, was expected to have before it the material necessary to a proper understanding of the case—to have before them all the material the municipal council had, or *ought to have had* before them, to enable them rightly to determine what was most expedient, having regard to the promotion of education, and the spirit of the school law, but bodies of this kind might act like other legislative bodies, upon a species of evidence not recognized in courts dealing with strictly individual rights. A technical objection was also taken to the sufficiency of the by-law, which, it was contended, was bad, the notice by the Council not being sufficient under section 81.

The Judge declined to enter into any question of the kind. He thought the committee, if the by-law were good on its face, had no power to quash or declare it invalid by reason of non-compliance with any pre-requisite. The Legislature could never have intended that a tribunal composed as this was should attempt to settle questions of law for testing that for which another provision was elsewhere made. His impression, however, was that the parties now objecting having attended the discussion in Council, the notice was sufficient, if, indeed, the question as to what was sufficient notice was not wholly left to the Municipal Council to decide.

The learned judge added, however, that if it appeared that by any trick the parties objecting were thrown off their guard, and diverted from an opposition that *might* have been effective, on a fair consideration, he would not hesitate to restore matters to the original position, as no one ought to be allowed to take advantage of a contrived wrong.

The papers put in, where not original documents, were certified by the proper officers having charge of the originals. After the hearing, a day was appointed for giving judgment.

Subjoined are skeleton forms, from the forms of the decisions or judgments in these cases, which were framed by the learned Judge himself, and signed by all. In the one case the action of the Township Council was confirmed—in the other the school boundaries were altered.

Judgment of "Committee" appointed under sect. 88, where school section confirmed:—

"To the Corporation of the County of ———, and to all to whom these presents shall come, greeting:

"We, the undersigned, —— —— County Judge of the County of ———, —— of ———, ——, and —— ——, a County School Inspector, a committee of three named and appointed by the Municipal Council of the said County of ——, under section 88 of the Public Schools Act, to investigate the matter of appeal or complaint of ——— ———, etc., against a by-law of the Corporation of the Township of ———, for the formation of a new School Section, No. ——, within the said Township, having investigated the said matter so committed to us, and having heard and considered the allegations and proofs submitted to us by the complainant or appellant, and by the said Corporation of ———, by the trustees of School section No.——of the said Township, and by all other parties affected by the formation of the said new school section who appeared before us, do, in pursuance of the statute in that behalf, determine and decide the matters complained of, and to us referred as aforesaid as follows: We decide, order, and adjudge that the said by-law of the corporation of———, No.——, establishing a new school section, No.——, in and for the said Township, shall * stand and remain as enacted, and the said By-law and the school section thereby formed, are hereby confirmed.

"Done in pursuance of the statute, and reported in duplicate this——day of——, 188 "

Judgment of Committee appointed under section 88, where boundaries of school section altered:—

*(Follow preceding form down to * and then continue.)*

As regards the boundaries of the school section thereby established, be revised and altered, by striking out of the said by-law ———, and by inserting therein ———,

so that the said school section, No. ——, and the boundaries thereof as now altered, settled, and determined by us, shall be, and are, as follows, viz :—"School Section No.—— of the said Township of————," &c. And the said By law and the school section No.——, thereby established, as thus altered, shall stand and remain. Done, &c.

[*Communicated.*]

RE-ARRANGEMENT OF THE ENGLISH COURTS.

A letter written by Lord Selborne, the Chancellor of England, to the late Lord Chief Justice Cockburn, in October last, has resulted in some important alterations in the judicial arrangements of the High Court of Justice.

By the Judicature Act of 1873, sec. 32, the Queen may, by order in Council, upon the recommendation of a council of judges of the Supreme Court, reduce the number of Divisions of the High Court, and give any necessary consequent directions for that purpose; and may also provide for the abolition, on vacancy, of the distinction of the offices and salaries, &c., of the Chief Justice of the Common Pleas and the Chief Baron of the Exchequer from the offices, &c., of the puisne judges. Let it also be borne in mind that at the time Lord Selborne wrote. the Chief Barony of the Exchequer was vacant by the death of Sir Fitzroy Kelly.

The Lord Chancellor suggested that advantage might be taken of the present vacancy in the office of Chief Baron for the following purposes: (1) To reduce the number of the Divisions of the High Court of Justice by uniting in a single Division (which might, he thought, bear the name of the Queen's Bench Division), the three Divisions now called respectively the Queen's Bench Division, the Common Pleas Division, and the Exchequer Division; (2) to abolish the titular and other distinctions between the office, now vacant, of Lord Chief Baron and that of a puisne judge, so that the present vacancy should be supplied by the appointment of an additional puisne judge only; and (3) to provide for the abolition, in like manner, upon the next vacancy, of the distinctions between the office of Chief Justice of the Common Pleas and that of a puisne judge. The new consolidated Division would, of course, be under the presidency of the Lord Chief Justice of England, and would be capable, under his authority, of full and complete unity of administration.

The letter also suggested a meeting of the Council of judges to take this matter into consideration. This meeting was accordingly held in November last, but in the meantime Chief Justice Cockburn had died, and Lord Coleridge had been appointed in his place. It will therefore be seen that when the meeting took place the only remaining difficulty in the way of carrying out Lord Selborne's suggestion, so far as the Common Law Divisions was concerned, was at an end.

It may here be remarked that Sir Alex. Cockburn had conceived a prejudice against the Judicature Act which, had he lived, might have been opposed to the proposed changes. The cause of this prejudice is said to have been Lord Hatherley's proposal to convert the Court of Queen's Bench into "Chamber No. 2," a suggestion exceedingly repugnant to the chief's conception of the dignity of the office he filled.

At the meeting of the Council it was accordingly resolved that the Queen's Bench, the Common Pleas, and the Exchequer Divisions should be consolidated and hereafter be known as the Queen's Bench Division, and that the distinction of the offices of the Chief Justice of the Common Pleas and the Chief Baron of the Exchequer should be abolished. This resolution will doubtless become law as soon as certain formalities have been complied with; and the vacancies on the Bench, will, under this new arrangement, be filled by two puisne judges in place of the extinguished chiefs. The names of those spoken of as likely to be appointed are Sir Henry M.

Jackson, Bart., Q. C., and Charles Russell, Q. C.

There are not a few who question the policy of thus doing away with these judicial prizes. There may be said to be two main reasons tending to induce successful men to give up their practice and go on the Bench. One is a commendable desire to fill a highly honorable position, and the second is the certainty of a handsome salary for life. Now judicial salaries are not, in comparison with the standard of modern incomes, what they once were. In fact this inducement may be said to be practically at an end, even in England, and more so in this country. The salary will not, therefore, obtain the best men, and we certainly need the very best men, for cheap judges do not by any means ensure cheap justice; in fact much the reverse. As to the other inducement we may aptly quote the language of an English writer, when speaking on the question of judicial policy brought up by the publication of Lord Selborne's letter:—"An 'ordinary' judgeship is not quite what it once was; the very efficiency of the Court of Appeal has turned the courts of first instance in reality into inferior courts. It, therefore, may well admit of doubt whether the abolition of historic posts, such as that of the Chief Baron, is not a mistake. It does not need the example of Sir Alexander Cockburn to prove how great, how salutary, and elevating may be the influence of historical traditions and associations. The future will assuredly gain little by sacrificing the names or the offices which connect the judges of the High Court with an impressive and glorious past."

POWER OF COUNSEL AND SOLICITOR TO COMPROMISE SUITS.

The power to compromise suits and actions is incident to the general authority which attorneys and solicitors have to conduct causes on behalf of their clients. The attorney has been held to have power in the *bona fide* exercise of reasonable care and skill to compromise the pending litigation in any manner he may judge to be in the interest of his client. Such a compromise is binding, even if no express authority has been obtained from the client. But if there be no express authority, and the arrangement consented to is of so unfair a character as to suggest fraud, then the compromise is not binding on the client: *Brady* v. *Curran*, Ir. R. 2 C. L. 314; *Berry* v. *Mullen*, Ir. R. 5 Eq. 368. The general rule may perhaps be stated succinctly thus: The attorney has power to make *bona fide* compromises of the client's case in the absence of any dissent on the part of the latter: *Chambers* v. *Mason*, 5 C. B. N. S. 59.

If, however, the client has given express instructions not to compromise, the better view seems to be that a compromise thereafter effected will be valid as between the parties litigant, if there is nothing in the terms to suggest suspicion or to put the opposite party on enquiry as to the extent of the attorney's authority; but that as between attorney and client, the former is liable to an action for damages, and will not be exculpated though he show that his conduct was reasonable and skilful and for the benefit of his client: *Fray* v. *Voules*, 1 Ell. & Ell. 839.

This implied authority extends not merely to enter into a compromise, but justifies the entire abandonment of the claims of his client in the particular suit, *per* BACON, C. J. in bankruptcy in *Re Wood*, 21 W. R. 104; see also *Rumsay* v. *King*, 33 L. T. N. S. 728, as to *stet processus*.

The proctor who acts for a married woman has the like ample power to compromise on her behalf, and that in litigation affecting her matrimonial rights or otherwise: *Stanes* v. *Stanes*, L. R. 3 Prob. & Div. 42. So also may compromises be carried out on behalf of infants by the observance of certain pre-requisites which are well indicated by the Master of the Rolls in the case of *Wilson* v. *Birchall*, 29 W. R. 27: "Before sanction-

ing a compromise the Court requires an affidavit from the next friend or guardian, as the case may be, and the written opinion of the junior counsel to the effect that it is for the benefit of the infants. In addition, I always ask the leader myself, if I see one in Court, whether he concurs in the advice given."

The power of counsel to compromise is at least commensurate with that of the attorney, but some of the judges are disposed to give him more ample authority, so that he may even disregard the wishes of his client. It is questionable, however, whether the law can be, and it is undesirable that it should be carried to this extent. One of the cases which has gone furthest is *Strauss* v. *Francis*, L. R. 1 Q. B. 379. It was there held that counsel retained to conduct the cause had power in court to consent to the withdrawal of a juror, and to put an end to the cause, that being within his apparent authority, and that his action was binding on his client notwithstanding the client's dissent, unless this dissent is brought to the knowledge of the opposite party at the time. The views of Malins, V. C., in *Jesse* v. *Holt* 24 W. R, 879, somewhat modify this conclusion. He said that where an order is made by consent through inadvertence of counsel or misapprehension on the part of the client, to which order in fact the client did not consent, the Court would not hold the client bound irrevocably thereby. But in this case before him, where the order was made in the presence of the defendant, his solicitor and counsel, and the case was a simple one, the judge declined to interfere upon the defendant alleging that he had not consented, and that his counsel had no authority to consent, and that he had not understood what was being done. A similar case came before Fry J. in the *Attorney-General*, v. *Tomline*, L. R. 7 Ch. D. 388. He refused to give relief where the order compromising the case had been drawn up, passed and entered between two and three weeks after the delivery of the judgment based on the consent. The client alleged that he had been under a misapprehension of facts. But it was held that he was too late in moving, and that it was his duty to ascertain the correctness of the facts within a reasonable time.

A distinction is to be noted which will help to reconcile many of the observations made by different judges, which would otherwise prove rather embarrassing ; that is, special importance is attached to arrangements for a compromise, which are made in open Court, whereas the same conclusive effect will not be attributed to terms of compromise arranged out of Court by the representatives of the clients, whether counsel or attorneys. Some of the cases show that practically it is well-nigh impossible to get rid of a compromise which has been embodied in an order or rule. Mr. Justice Fry observed in the *Attorney-General* v. *Tomline*, that when the order is passed and entered it could only be set aside for reasons which would enable the Court to set aside an agreement. In *Rogers* v *Horn*, 26 W. R. 432, it was held that the consent might be withdrawn at any time before the order was passed and entered, but other authorities are to be found at variance with this ruling ; as, for instance, *In re the North-west of Ireland Deep Sea Fishery Company* (16th March 1871), wherein Bacon, V. C., refused to allow the parties to recede from an agreement made by a junior counsel on his own judgment, and without express authority, on which an order of Court had been made, although it was immediately repudiated by the solicitor, even before the order had been drawn up : 18 Sol. J. 376. No doubt the best plan in all cases is to consult the client before effecting the compromise, and if the client refuses his counsel's suggestions and insists on a course inconsistent therewith, then the counsel should return his brief.

THE RIGHT OF CROWN COUNSEL TO ENTER A NOLLE PROSEQUI.

The practice of entering a *nolle prosequi* is not of very frequent occurrence, but occasions may, and do, arise, when it is expedient that such a pleading should be filed, especially when in the course of a criminal prosecution a new indictment should be preferred, or where the Crown is desirous of calling one of several defendants as a witness against the others.

A *nolle prosequi* stays proceedings upon an indictment, or criminal information, and may be entered at any time before the verdict is recorded: *Rex* v. *Roper*, 1 Cr. & Dix (Irish) 185, or perhaps before judgment has been given: *Rex* v. *Hampstead*, Russ. & Ry. 344. The effect of the entry is not to discharge the crime, but to put the defendant without day: *Rex* v. *Redpath*, 10 Mod. 152.

All criminal proceedings being taken in the name of the Crown and for the public benefit, the Attorney-General may at any stage of the prosecution, either by indictment or criminal information, interpose his authority and stay the proceedings by the entry of a *nolle prosequi*: *Reg.* v. *Teal*, 11 East 307, *Reg.* v. *Redpath*, 10 Mod. 152, *Stretton's case*, 1 Leon. 119). Thus if he sees clearly that the indictment is not sustainable: *Rex* v. *Pond*, 1 Comyns 312; or that the prosecutor is using the name of the Crown as an engine of oppression, by suing and prosecuting at the same time, for the same offence: *Rex* v. *Fielding*, 2 Burr, 720; or by frequently and vexatiously preferring defective indictments: Hayes' Criminal Law, 573, or that the verdict is repugnant: *Rex* v. *Hempstead*, Russ & Ry. 344, or that the defendant has been convicted without evidence when he was given in charge of a jury without evidence: *Rex* v. *Roper*, Cr. & Dix 185. A *nolle prosequi* may be entered to one or more of several defendants: *Rex* v. *Teal* 11 East 307, *Walsh* v. *Bishop*, Cro. Car. 239, 243), or it may be entered as to one of several counts in the indictment or information: *Milliken* v. *Cox*, 1 B. & P. 157, *Bertram* v. *Gordon*, 6 Taunt. 414. And the Attorney-General on the *ex parte* application of the defendant, and without calling the prosecutor before him, may enter a *nolle prosequi*: *Reg. Allen*, 1 B. & S. 850.

In Archbold's Criminal Pleading it is said that a *nolle prosequi* cannot be entered either in the Queen's Bench, or at the Assizes, or Quarter Sessions, without the authority of the Attorney-General, or perhaps, in the vacancy of that office, of the Solicitor-General. And this would seem to indicate that the personal assent of one of the law officers of the Crown must be obtained before the *nolle prosequi* can be properly entered.

Of the authorities cited in support of this view of the practice, only one, *Reg.* v. *Dunn*, 1 C. & K. 730, sustains it. Then Mr. Archibold, for the prosecution, proposed to enter a *nolle prosequi* to a defective indictment, but Mr. Justice Wightman held that it could only be entered by the authority of the Attorney-General. An order was then obtained quashing the indictment. In *Rex* v. *Cranmer*, 1 Ld. Raym. 721, a *nolle prosequi* entered by the Clerk of the Crown, without the leave of the Attorney-General, was set aside.

The case of *Rex* v. *Colling*, 2 Cox C. C. 184, also given in Archbold as an authority for his opinion, does not sustain it. In that case Alderson, B., suggested that the record should be withdrawn, and the counsel for the Crown then stated he would enter a *nolle prosequi*. It was objected that, as the indictment had been removed by *certiorari*, a *nolle prosequi* could not be entered without the leave of the Attorney-General. Alderson, B., without apparently deciding the point, said: "It is nonsense going on, when it is quite certain what the result must be. You had better let a verdict be taken against you at once," and thereupon a verdict of not guilty was recorded.

In an Irish case, *Rex* v. *Roper*, *supra*, the prisoner was arraigned on two indictments, one for stealing a half crown piece, and the

other for uttering a counterfeit half crown. Both charges arose out of the one transaction. The prisoner was tried on the larceny indictment, and was convicted. He was then arraigned on the second indictment, but no evidence was offered on the part of the Crown. The jury (an Irish jury!), contrary to expectation, found the prisoner guilty on this also. It was then suggested that a *nolle prosequi* might be entered before the verdict was recorded. Mr. Baron Smith, at first doubted if this could be done, but after the matter had been mentioned to Chief Justice Bushe, who was then sitting in the Civil Court, with the concurrence of both learned judges, a *nolle prosequi* was entered. The Attorney-General was not present, nor does it appear from the report that he was applied to for his consent.

But in the case of *Regina* v. *Campbell*, 3 Cr. & Dix, 33; Irish Cir. R. 770, the question came up directly whether the Crown Counsel, during the course of the trial, could enter a *nolle prosequi* without the personal assent of the Attorney-General. Counsel for the prisoner contended that the Crown could not enter a *nolle prosequi*, after Counsel had gone into the case and failed. Mr. O'Hagan (now Lord Chancellor O'Hagan), as *amicus curiæ*, referred to Hayes on Criminal Law, p. 573; *Rex* v. *Roper*, 1 Cr. & Dix 185, *Rex* v. *Cranmer*, 1 Ld. Raym. 721, in order to show that the Crown, or those who represent the Attorney-General, may enter a *nolle prosequi* at any time before the verdict is recorded. The passage from Hayes reads thus: "A *nolle prosequi* cannot be entered by the Clerk of the Crown or Peace, merely at the instance of the prosecutor, without the direction of the Attorney-General, or those who represent him in the county."

The Chief Baron Brady (afterwards Lord Chancellor), who was then presiding at the Assizes, allowed the *nolle prosequi* to be entered, and said: "I have no doubt that the Attorney-General himself has a power to do so at any time; but the question is, can any one but the Attorney-General himself do so? The public convenience would seem to require that those who represent the Crown, should have such power. I shall therefore make an order that a *nolle prosequi* be entered in this case at the request of Sir Thomas Staples, representing the Attorney-General." This case was decided in 1843, the same year in which *Reg.* v. *Dunn* was decided.

Two cases in the Supreme Court of New Brunswick are to the same effect. In *Regina* v. *Sturges*, 5 Allen N. B. 552, the Court held that a *nolle prosequi* could be entered by the Solicitor-General without the direction of the Attorney-General. But in the case of *Regina* v. *Thornton*, 2 Pugs. & B. 140, a *nolle prosequi* had been entered, during the trial, by the Clerk of the Crown, who conducted the prosecution on behalf of the Attorney-General, and his act was sustained by the full Court. Chief Justice Allen, in referring to the previous case of *Regina* v. *Sturges*, said: "It would seem to establish that the power to terminate a proceeding instituted by the Crown is not confined to the Attorney-General in person, but may be exercised by the officer acting for the Crown in the particular proceeding." From these cases it would appear that Crown Counsel representing the Attorney-General at the Assizes may enter a *nolle prosequi* in cases where the Court thinks it is proper that the prosecution should be so terminated unless Mr. Justice Wightman's *dictum* in *Reg.* v. *Dunn* should be held to be the law. But it is doubtful whether County Crown Attorneys would have such a power, as they act under statutory powers and do not represent the Attorney-General in the same sense that Crown Counsel do, who are specially retained to act for the Attorney-General in Crown prosecutions T. H.

CHIEF JUSTICE COCKBURN.

One of the many great men that England has produced has passed away. Personally, a remarkable man, with many of the qualities that make men famous, he was connected with many noteworthy events that brought

him prominently into the notice, not only of his own nation, but of Europe and America. Not the greatest and not the noblest of the many eminent men who have occupied the seat of Holt and Mansfield, he will probably be known in history as second only to those great light-bearers of British law and justice, though his talents were of a different order, and of a character less lasting in their force.

Sir Alexander Cockburn was born on the 24th December, 1802. His father was in the diplomatic service, and his mother was the daughter of the Vicomte de Vignier. He was descended from a Scotch family of antiquity; his ancestor, Sir William Cockburn, obtained a grant of the lands and barony of Langton, in 1595, and his family held lands of the Crown as far back as the time of David II of Scotland. He obtained distinction as a classical scholar at Cambridge; and, in after life, when presiding at the Tichborne trial, it is said that an application for a card of admission which had been made to him in vain, in English, was granted immediately, when it was repeated in classic Greek.

Mr. Cockburn was a member of the Middle Temple, and was called to the Bar in 1829, and went the Western Circuit and Devon Sessions. He subsequently acquired a large practice in London in railway and election cases. Although he did his best for his clients, he was careful that they should do their duty by him, and the story is told that on one occasion, when an election committee met, Mr. Cockburn, the counsel for one of the parties, was absent because his fee had not accompanied the brief, and the only message left was that he had gone to the Derby, with the remark that "a man might as well play for nothing as work for nothing."

In 1847 Mr. Cockburn entered Parliament, as a Liberal, and proved himself a debater of great oratorical powers. Justin McCarthy, in his interesting "History of our Own Times," thus refers to the famous speech delivered in 1850, which induced Sir John Russell to make him his Solicitor-General:

"Of many fine speeches made during this brilliant debate, we must notice one in particular. It was that of Mr. Cockburn, then member for Southampton. Never in our time has a reputation been more suddenly, completely, and deservedly made than Mr. Cockburn won by his brilliant display of ingenious argument and stirring words. The manner of the speaker lent additional effect to his clever and captivating eloquence. He had a clear, sweet, penetrating voice, a fluency that seemed so easy as to make listeners sometimes fancy that it ought to cost no effort, and a grace of gesture such as it must be owned the courts of law, where he had had his training, do not often teach us. Mr. Cobden observed that when Mr. Cockburn had concluded his speech, 'one half of the Treasury benches were left empty, while honorable members ran after one another, tumbling over each other in their haste to shake hands with the honorable and learned member.' Mr. Cockburn's career was safe from that hour. It is needless to say that he well upheld in after years the reputation he won in a night."

In 1851, on the elevation of Sir John Romilly to the Bench, he was appointed Attorney General. He was engaged in many important trials, among which may be named the libel case of *Achilli* v. *Newman*, the celebrated *Swinfen* case, in which the proceedings were stayed by an agreement made between the counsel, Sir F. Thesiger and Sir Alexander Cockburn, for a certain sum, in defiance, as was alleged, of the instructions to the latter by his client. In the well-known Rugely poisoning case, Sir Alexander acted for the prosecution, and the prisoner, Dr. Palmer, was found guilty and executed.

In 1856 Sir Alexander Cockburn was made Chief Justice of the Common Pleas in the room of Sir John Jervis; and, on 24th June, 1859, he became Chief Justice of England, on Lord Campbell's becoming Lord Chancellor. His career on the Bench is thus alluded to in the English *Law Journal.*

Chief Justice Cockburn.

"The judicial career of the late Lord Chief Justice was a long one, lasting over precisely twenty-four years. His charges to juries were masterpieces of popular oratory; and there was little chance for the most skilful counsel if the Lord Chief Justice became convinced of the duty to sum up against him. His considered judgments were marvels of exposition. It was said of another learned judge that he knew nothing of the law of the case when the other judges began to deliver their judgments, but that by the time they had finished he could produce an admirable piece of eclectic reasoning. Sir Alexander Cockburn was also quick to pick up points from counsel or his learned brethren. An indisputable merit of Sir A. Cockburn was that he took pains with his work, especially with such portions of it as came into more than usual publicity; and he would, in important cases, find some reason for adjourning the court, in order that he might prepare a judgment or a charge which would be of classical excellence." But the most important trial in which he was concerned was, of course, the Tichborne trial, which began in 1873. "Thomas Castro had lost his action for ejectment in 1871, before Lord Chief Justice Bovill, in the Common Pleas; his indictment for perjury was tried at bar for 188 days in the Queen's Bench before the Lord Chief Justice and Justices Mellor and Lush. Sir John Coleridge had led in the civil action, Mr. Justice Hawkins (then Mr. Hawkins, Q. C.,) led in the prosecution which sprang out of it. Dr. Kenealy was the leading counsel for the defence. Sir Alexander Cockburn's chief task was to control the zeal of Dr. Kenealy. His patronage had formerly been invaluable to this powerful but unscrupulous advocate, but he met with nothing but insults and ingratitude. Even when the trial was over Dr. Kenealy pursued him with the grossest calumny in a scurrilous paper which he published. How severe was the constraint to which the Chief Justice could subject himself was shown in the Kenealy incidents of this trial. Such was the impression of power which the Chief Justice produced on the bench that there were few men who dared take a liberty with him. A word from the voice which could speak daggers was generally enough. Dr. Kenealy's manner, therefore, was little likely to be brooked by a Chief Justice so accustomed to respect and almost subservience. But the Lord Chief Justice knew that Dr. Kenealy's committal for contempt would seriously embarrass the trial of the Claimant in public estimation, and he refrained from that step, although it was fully deserved. The Tichborne trial in other respects was such as to test to the utmost the moral side of the judicial nature. The Lord Chief Justice was unwearying in patient listening, and untiring in collating and expounding the facts. His summing up was a model of lucid statement and elaborate reasoning. It lasted eighteen days, and made the aquittal of the prisoner impossible."

The *Law Times*, speaking on the same subject, takes a view less favourable, saying:—

"It is equally certain that, whilst he carried on to the bench this high code of honor, the very loftiest sentiments which could animate a judge, the deepest regard for his office, and the keenest sense of its responsibilities, he never thoroughly shook off the passion of the advocate. If there is one fault which can be laid to his charge as a judge, it is that with too rapid a judgment he formed his opinion, basing it frequently upon the evidence and bearing of particular witnesses. The opinion formed, it was put forward in the summing up with the art of the advocate, repressed more or less, but still preceptible, and occassioning sometimes the impression that the scales of justice had not been held with that absolute impartiality which is essential to the strict administration of the law. No one who has attempted the perusal of the summing up in the *Tichborne* case—an effort which the Lord Chief Justice subsequently published separately, and which in itself forms a volume—can fail to perceive with what dexterous skill the case for the defence was broken

down. And again, no one who followed the course of that trial, with its frequent conflicts between the bench and the bar, could honestly say that the outrageous conduct of the prisoner's counsel was altogether unprovoked. If any doubt had ever existed in the minds of the jury, the demeanor and the summing up of the Chief Justice told them very plainly that they must convict."

Lord Coleridge, when announcing in the Court of Common Pleas the death of the late Chief Justice thus alluded to the late Chief Justice. "As a Judge, his chief and leading characteristic appeared to me to be a sleepless and ardent desire to do justice as between man and man to the suitors who came before him. Though naturally inclined to ease and pleasure, he shrank from no trouble, he declined no toil, that might lead him to the truth. He kept his mind open to the very end, and he was always ready to listen to any piece of evidence or weigh any argument that in his judgment was likely to lead him to justice. Like other men, he had prejudice and bias of opinion, which he shared with the rest of mankind. He never permitted them, so far as I saw, for a single instant to divert him from a single-minded and most earnest pursuit of what he believed to be right between the parties. If you had a good case, however complicated it might be, however much prejudice there might appear to be against it, only make Sir Alexander Cockburn understand it, and you were perfectly safe in his hands. Now this is simple, literal truth. No one, I am satisfied, can deny it. Yet stand and reflect what high and great qualities of head and heart this simple truth implies. He died, as he often said in my hearing he wished to die, in harness, enjoying life and doing duty to the very end."

Sir Alexander Cockburn was a prominent figure in the prosecution of Governor Eyre in the Jamaica case, where, in his address to the Grand Jury, he laid down the limits of military law, as opposed to the personal liberty of the subject. The *Pall Mall Gazette* thus alludes to his share in this transaction, and although there are many who think that the grand Jury were not far wrong, the tribute to Sir Alexander Cockburn's memory may here be appropriately inserted :—

"The Chief Justice of England alone almost among the English official world remembered that the first duty of a judge is to see that justice is done on oppressors. His efforts failed. The Governor was not brought to trial. It is, however, a permanent gain for English justice, which no perversity of a grand jury can destroy, that the Chief Justice of England used all his power, his eloquence, and his position to ensure that British subjects, even though they happened to be blacks, should not appeal in vain to English courts for justice. He failed; but his efforts to ensure justice for the oppressed will be a monument both of Sir Alexander Cockburn's fine public spirit and of the virtues, now too much forgotten, which belong to the rhetorical character."

His connection with the Geneva Award under the Washington Treaty, is a matter of history. The brilliant document in which he dissented from the rest of the arbitrators was a masterly protest in favour of his country's rights. He at least was not of the stuff of which most of the modern statesmen of England are made, who too often weakly give up what her sons have bravely won.

We notice that our American exchanges have little praise to bestow upon this remarkable man. His attitude in connection with this same matter is doubtless the reason. He was in his lifetime shamefully abused by public men in the United States because he had the courage to express his opinions fearlessly against a wrong done to his country, and because his unanswerable arguments, couched in his own vigorous language, and vivified with the fire of his brilliant intellect, were too much for the composure of a nation that as such had not been in the habit of receiving

such a "facer;" if Sir Alexander Cockburn had had his way it would not have been necessary to squabble over money, to which they have since been compelled to admit they were never entitled.

Sir Alexander was a man of versatile talent, of great mental force, and of personal qualities that gave him great influence with men. He had, moreover, a voice of remarkable flexibility and power, a gift of language seldom excelled; and is said to have been the best speaker of his day, or perhaps of the century.

One striking feature in his character was his reverence for the position he held, and a high sense of the responsibilities thereby devolving upon him. This, though unfortunately not exhibited in private to the same extent as in public life, is well put by the same paper from which we have already culled. —"To feel the greatness of a great position, to appreciate the dignity and the responsibility involved in being a successor to men whose names will live as long as English history endures, to delight in the forms and names and ceremonies which recalled the traditional importance of his office, was in Sir Alexander Cockburn's case no mere joy in childish pomp, nor any mere gratification of personal vanity, but the expression of the sentiment which has again and again elevated smaller men than he was into great characters—the feeling that great place demands the display of public virtues. He belonged in truth by character to the eighteenth rather than to the nineteenth century."

We regret that a record of Sir Alexander Cockburn's life compels the faithful journalist to notice the great blot in his character, viz: the irregularity of his domestic relations. Offences of this nature are bad enough in any man, but however society may excuse them when committed by private citizens, they cannot be passed over without severe censure when charged against one occupying the position which the Chief Justice did.

He died suddenly on the 20th November last at the age of seventy-eight. A few hours previously he was presiding over the Court for the consideration of Crown Cases Reserved. He was buried, at his own request, in Kensal Green cemetery, and not in Westminster Abbey.

LAW SOCIETY.

MICHAELMAS TERM, 1880.

The following is the *Resume* of the proceedings of the Benchers during the last Term, published by authority:—

MONDAY, 15th November.

Present,—Messrs. Irving, Kerr, Crickmore, MacKelcan, Maclennan, McMichael, Bethune, Benson, Smith, Hoskin.

Mr. Maclennan was appointed chairman in the absence of the Treasurer.

The minutes of last meeting were read and approved.

The Report of the Examiners on the examination for call to the bar, and the Secretary's Report, were received, read, and adopted.

Ordered, that Messrs. P. C. MacNee, R. H. Myers, and A. D. Perry, be called to the bar, and that Messrs. Ponton, Ede, Brown, Moffat, and Irving be called on completing their papers.

The Report of the Examiners on the examination of candidates for certificates of fitness, and the Secretary's Report, were received, read, and adopted.

Ordered, that the following gentlemen do receive their certificates of fitness, namely:—

Messrs. A. D. Perry, J. Harley, W. A. Wilkes, D. H. Cooper, F. C. Moffatt, J. R. Lavell, W. N. Ponton, P. E. Irving and W. D. Swayze; and that the cases of Messrs. R. Harcourt, C. H. Allen, E. B. Brown, J. L. Dowlin, R. H. Myers, and W. B. Mcalise, be referred to the Committee on Legal Education for report.

The Report of the Examiners on the first intermediate examination, and the Secretary's Report thereon, were received and read.

Ordered, that the following gentlemen be allowed their first intermediate examination as students and articled clerks, namely:—

J. A. C. Reynolds, J. A. Walker, G. B. Douglas, E. J. Hearn, D. H. Tennent, H. I. Eberts, C. R. Irvine, C. H. Cline, Jas. Campbell, J. E. Bullen, I. Stewart, F. E.

Bertrand, F. W. Garvin, E. R. Reynolds, W. H. Wardrope, F. S. Wallbridge, H. White, J. Carruthers, A. P. E. Panet.

The Report of the Examiners on second intermediate examination, and the Secretary's Report thereon, were received and read.

Ordered, that the following gentlemen be allowed their examinations as students and articled clerks, namely:—

C. G. O'Brian, W. L. Palmer, Jas. Garbutt, J. H. D. Munson, T. A. O'Rourke, A. J. Snow, A. W. Ford, H. Nason, H. Widdifield, J. W. Curry, A. W. Hughson, A. H. Clarke, G. Beavers, A. Howden, J. W. Russell, C. A. Forster, E. R. C. Proctor, F. E. Curtis, W. T. Easton, R. Gilray, J. Christie, F. A. Eddis, C. E. Carbert, T. H. Dyre, J. G. Dowse, A. N. Duncombe, W. A. Adair, J. W. Smaill, H. V. Carter, W. M. Elliott.

The Report of the Legal Education Committee on the primary examination was received and read.

Ordered, that the following gentlemen, who have been reported as entitled as graduates, be entered on the books of the Society as students-at-law, namely:—

GRADUATES.

D. C. Ross, Andrew C. Muir, William Cook, W. A. Shortt, Cornelius Arthur Masten, William Clark Widdifield, George W. Allen, James M. Duncan, George Ingles, Joseph B. Chambers, and Andrew Watson.

Ordered, that the following gentlemen, who have been reported as entitled as matriculants of Universities be entered on the books as students-at-law, namely:—

William Andrew Dixon Lees, Donald McArthur. J. M. Duggan, Lincoln Hatton, Hugh T. Kelly, John Edward O'Meara, George Alfred Payne, A. M. Dymond, and P. McCullogh.

Ordered, that the following gentlemen, who have been reported as having passed the examination, be entered on the books as students-at-law, namely:—

John Campbell, W. E. McKeough, Jno. Youell, J. H. McArthur, Eli Hodgins, C. B. Jackson, Thomas Farmer, A. E. Kennedy, W. M. Campbell, P. J. Madden, Robert Walker, D. A. Haggart, A. Hoyles, F. A. Roe, C. Horton, Thos. Lafferty, L. C. Raymond, A. Rennie, H. H. Bolton, A. Skinner, G. E. Burns, L. H. Baldwin. W. D. McPherson, T. E. Griffith, C. C. Johnson, James A. Loughead, A. G. Chisholm.

Ordered that the following gentlemen be allowed their examination for articled clerks, F. E. McDonald, and O. E. Fleming.

Mr. Crickmore presented the Report of the Legal Education Committee on the question of the scholarships and the mode of conducting the examinations, which was received and read as follows:

The Report of the Legal Education Committee upon the questions submit ed to them by the Special Committee on Scholarships.

This Committee recommend as follows:

1. That from and after Michaelmas Term, 1880, the Intermediate Examinations should take place during the third week next before the beginning of each Term, the Second Intermediate to take place on the Tuesday and Wednesday, and the First on the Thursday and Friday.

2. That the candidates for the Second Intermediate should present themselves for examination at 9 o'clock, a. m., on the Tuesday, and that the candidates for the First Intermediate should present themselves for examination at 9 o'clock, a. m., on the Thursday of the third week before each term.

3. That the examinations should be held as well in the Convocation Room as in the Lecture Room, for the more effectual isolation of the students, until the new examination hall shall be built.

4. That there should be a paper by each of the four examiners for each of the two Intermediate Examinations.

5. That there should be a recess of one hour in each Intermediate Examination—each examination to begin at 9.30, a. m., and continue until 1 o'clock, then recess, and beginning again at 2 o'clock, p. m., and ending at 5.30, p. m., two papers to be given out, and answers taken up in the morning session, and two in the afternoon session.

6. That all four examiners should be present and enter on the business of the examination not later than 9.30, a. m., on each of the same four days, and should be present, two in each room, during the whole of the examinations.

7. That on the second day of each Intermediate Examination, the Honor and Scholarship Examination should be conducted in one room, and the Orals in the other—And that for each of the Honor and Scholarship Examinations, a paper of questions should be prepared by each of the four Examiners—and that they should so manage and regulate the other details of the examin-

ations as to secure the objects of the examinations, and the obtaining of the best and truest tests of the qualifications of the candidates for the standing, honors or scholarships to be awarded.

JOHN CRICKMORE.
Michaelmas Term

Ordered for immediate consideration, and adopted.

Mr. Crickmore presented the report upon the petitions of John McCabe, Horace Comfort, and F. W. Garvin, which was received, read, and adopted.

Ordered, that Mr. McCabe be permitted to present himself next term for examination for certificate of fitness, and that upon passing the required examination he receive his certificate of fitness upon payment of the ordinary fees.

That Horace E. Comfort receive his certificate of fitness on passing the usual final examinations.

And that the prayer of Mr. Garvin's petition be granted, and his time allowed as if his articles and assignment had been filed in proper time.

Mr. MacKelcan presented the report of the Committee on Reporting.

Ordered for consideration on Saturday next.

The petition of Mr. J. B. Davis, a solicitor, respecting his fees, was received, read, and referred to the Finance Committee with power to act.

The petition of William Larmour was received, read, and referred to Committee on Discipline for preliminary enquiry and report.

The petition of the Osgoode Literary and Legal Society was received and read.

Ordered to be considered on Saturday next.

A letter was received from Mr. James A. Miller, dated 26th October last, and received on that date, resigning his seat as a Bencher.

Ordered, that his resignation be accepted, and that notices issue for the election of a Bencher in place of Mr. Miller, on the last Friday of this Term.

A communication from Mr. Carswell on the subject of the Reports was read and referred to the Committee on Reporting.

A communication from Mr. Carswell relating to the supply of books for the Library was read and referred to the Library Committee.

Mr. Crickmore, Mr. MacKelcan, and Mr. Kerr, were appointed a committee to examine the Journals of Convocation, and report upon any vacancy in the Bench without delay.

Mr. Irving having drawn the attention of Convocation to the resignation of his employment by Mr. G. H. Esten, it was referred to the Library and Finance Committees jointly to consider and report upon the question of assistance to the Librarian and Secretary.

Mr. Irving brought to the attention of Convocation the case of a volume of Lindley on Partnership, which had been removed from the Library by some gentleman through inadvertence, and which had been returned by a clerk in Mr. W——'s office.

Ordered, that Mr W—— be requested to communicate to Convocation the name of the gentleman who took the book from the Library.

The report of the Committee to examine Journals was received and read, reporting that Mr. E. Crombie's seat had become vacant on the last day of Easter Term last, from non-attendance.

Ordered, that a Bencher be elected in place of Mr. Crombie on the last Friday of this term, and that the usual notices be issued.

The Secretary having stated that Eudo Saunders and W. M. Elliott, articled clerks on the books of Convocation, are reported to be practising as attorneys and solicitors without qualifications,

Ordered that their cases be referred to the Committee on Discipline for enquiry.

Dr. Smith gave the following notice of motion for Tuesday, 16th November, 1880:

That the Finance Committee be requested to procure such information as may be necessary for obtaining a likeness of the late Chief Justice Osgoode, to the end that a portrait of him may be painted and placed upon the walls of the building, and to report thereon at an early day.

Convocation adjourned.

TUESDAY, 16th November, 1880.

Present.—Messrs. Crickmore, MacKelcan, Kerr, Irving, Martin, Hoskin, Maclennan, Read, Benson, Bethune.

Mr. Maclennan was appointed Chairman of Convocation in the absence of the Treasurer.

The minutes of last meeting were read and approved.

The Secretary reported that Messrs. Ponton, Brown, Moffat, Ede, and Irving, had completed their papers.

Messrs. MacNee, Myers, Ponton, Brown,

Irving, Moffat, Ede, and Perry were then called pursuant to order of Monday last.

Mr. Irving presented report from Library Committee.

Ordered for immediate consideration and adopted.

Mr. Crickmore presented the report of the Joint Committees of Library and Finance on assistance to the Librarian and Secretary.

Ordered for immediate consideration.

Adopted with certain amendments.

Report amended accordingly.

Ordered, that notice be given of the appointment of the officers mentioned in the report for the last Friday of Term.

Ordered, that it be referred to a Special Committee, composed of the Treasurer and the Chairman of the several Standing Committees, to select and recommend persons suitable for appointment.

Moved by Mr. Read,—

That the Finance Committee be requested to procure such information as may be necessary for obtaining a likeness of the late Chief Justice Osgoode, and report thereon at an early date.—Carried.

Mr. Read gave the following notice for Saturday next, namely:

That the Treasurer and Messrs. Crickmore, Bethune, Smith, Maclennan, and Read be appointed a committee to consider of and report a plan for the establishment of honor examinations and rewards of merit in connection with call to the Bar.

Mr. Crickmore presented a report upon all the cases referred to the Legal Education Committee yesterday, to enquire into the sufficiency of the papers, which report recommended that Messrs. Brown, Maclise, Myers, Allen, Dowlin, and R. Harcourt, do receive their certificates of fitness. The report was received and adopted, and it was ordered accordingly.

Convocation adjourned.

SATURDAY, 20th November, 1880.

Present—Messrs. Richards, Irving, Kerr, Benson, Maclennan, Read, Crickmore, Smith.

Mr. Maclennan was appointed Chairman, in the absence of the Treasurer.

Mr. Read presented the petition of G. A. Montgomery respecting his fees, which was read and referred to the Finance Committee with power to act.

A communication was read from Messrs. Brocker and Gallway, respecting a gas saving apparatus for Osgoode Hall, and referred to Finance Committee with power to act.

Mr. Crickmore presented the report of the Legal Education Committee, to the effect that Mr. James Gordon Jones, a graduate, was entitled to be entered as a student of the Laws.—Ordered accordingly.

On motion of Mr. Read, pursuant to notice, the following gentlemen were appointed a Committee to consider and report a plan for the establishment of Honor Examinations and rewards of merit in connection with call to the Bar, namely: The Treasurer and Messrs. Crickmore, Bethune, Smith, Maclennan and Read; the Committee to report without delay.

The report of the Reporting Committee, dated November 15, was received, read, and adopted, as follows:

The Committee on Reporting, beg leave to report as follows:—

Your Committee have arranged for 250 extra copies of the Supreme Court Reports at one dollar per volume.

They recommend that the copyright in all the reports for Ontario, to be issued in future, be secured to the Society.

They recommend that the editor and reporters be required to prepare, from the present time, the materials for a triennial digest of all the Ontario reports, including appeals to the Supreme Court and Privy Council from Ontario, and to issue the same to the profession promptly at the end of each triennial period.

They also recommend that the salary of the reporter of appeals and elections cases be increased to $1,200 per annum from the present time.

Nov. 15th, 1880. JAMES MACLENNAN.

Mr. Read gave notice that on the last Friday of this Term he would move as follows:

That a By-law be proposed for enactment by the Law Society for establishing a benevolent fund under the section of the Act of Parliament relating thereto; and that a committee be appointed to prepare and introduce such By-law, with leave to introduce the same at the next meeting of Convocation, and that the committee be composed of the following Benchers, namely: Messrs. Read, Crickmore, Smith, Kerr, Richards, and Hoskin.

Mr. Irving gave notice on behalf of the Treasurer that he would, on the last Friday of Term, move the adoption of a plan to encourage, by prizes, attend-

ance at lectures to be given by the Osgoode Literary Society as follows, namely:

That the Osgoode Literary and Legal Society having arranged for a course of lectures on various branches of law extending over the period from 23rd Oct., 1880, to 5th March, 1881, as follows:

Criminal Law—Mr. Delamere.
Partnership—Mr. W. Mulock.
Mortgages—Mr. C. R. W. Biggar.
Commercial Law—Mr. J. McDougall.
Statute of Frauds—Mr. G. T. Blackstock.
Fraudulent and Voluntary Conveyances—Mr. C. Moss.
Constitutional History—Mr. I. Campbell.
Real Property—Mr. Ewart.

With a view to encourage the efforts and promote the objects of the Society, prizes be placed at its disposal on the following terms:

In case the Society arranges for a written examination at the close of the course open to all law students, to be conducted by not less than two of the lecturers, embracing at least three questions on each subject, or twenty-four in all; of the competitors who obtain at least three-fouths of the aggregate marks obtainable in all the subjects, and at least one-half the marks obtainable in each subject, the first shall be entitled to a prize of books of the value of $50; the second, to a like prize of the value of $30, and the third, to a like prize of the value of $20.

That the result of the examinations be certified to the Treasurer by the examiners, and the prizes shall be awarded according to such certificate.

The petition of the Osgoode Literary and Legal Society for the use of books, was considered, and referred to the Library Committee to confer with a committee of the Literary Society on the subject of the petition.

Convocation adjourned.

FRIDAY, 3rd December.

Present.—The Treasurer, and Messrs. Martin, McKelcan, Smith, Irving, Maclennan, Kerr, Benson, Ferguson, McCarthy, Meredith, Hoskin, Cameron, McMichael, Crickmore, Britton, Read, Richards.

The minutes of last meeting were read and approved.

The report of the Examiners on the Scholarship Examinations was received, read and adopted.

Ordered, that the Scholarships be awarded as follows:—

4th Year,	MR. P. H. DRAYTON.
3rd "	" W. BURGESS.
2nd "	" J. L. MURPHY.
1st "	" J. DENOVAN.

The report of the select Committee appointed to consider and report a plan for the establishment of Honor Examinations and rewards of merit, in connection with Call to the Bar, was received, read, and adopted.

Mr. Martin, seconded by Mr. Ferguson, moved the first reading of the following rule, in pursuance of the recommendation contained in the Report, namely:—

1. That in each Term after Michaelmas Term, 1880, the persons who obtain at least three-fourths the marks obtainable on the papers at the examination for Call, be entitled to present themselves on the following day for a further written examination for honors in the same subjects, embracing the same number of questions with the same aggregate value of marks obtainable in each subject.

2. That the persons obtaining at least three-fourths of the aggregate number of marks obtainable on the papers in both the Pass and the Honor Examinations, and at least one-half of the aggregate marks obtainable on the papers in each subject, in both examinations, be called with honors, and that the diploma of each person so called shall certify to his call with honors.

3. That of the persons called with honors the first three be entitled to medals on the following conditions:—

The first, if he has passed both Intermediate Examinations with honors, to a gold medal, otherwise to a silver medal.

The second, if he has passed both Intermediate Examinations with honors, to a silver medal, otherwise to a bronze medal.

The third, if he has passed both Intermediate Examinations with honors, to a bronze medal.

And that the diplomas of each medallist shall certify to his being such medallist. That, for the purposes of this rule, only the passing of any Intermediate Examination heretofore taken without an oral, shall be deemed equivalent to passing such examination with honors.—Carried.

Mr. Ferguson, seconded by Mr. Maclennan, moved that the general rule be suspended, and that the rule just read be now read a second time.— Carried unanimously.

The rule was read a second time.

Resolved, that the rule be adopted.

The report of the Select Committee on the appointment of assistants in the library, was received and read.

Mr. Maclennan, seconded by Mr. McKelcan, moved the adoption of the first clause, which recommended the appointment of Mr. Grasett, as senior assistant.—Carried.

Ordered, that Mr. Charles Grasett be appointed senior assistant from January 1st, 1881, at a salary of $600 per annum.

The second clause of the report was then read.

The votes were taken, and Mr. Williams was declared elected.

Ordered, that Mr. Williams be appointed junior assistant, at a salary of $400 per annum, from 1st January, 1881.

The report of the Legal Education Committee on the Primary Examinations was received and read, as follows:

The Legal Education Committee recommend that for the years 1882, 1883, 1884, and 1885 the books and subjects in Classics and English for the Primary Examination of Students-at-law and Articled Clerks shall be as follows:—

Students-at-Law.

CLASSICS.

1882	Xen. Anabasis, Book I.	Cæsar, Bel., Brit. B. G. B. IV. C. 20-36
	Homer, Iliad, Book VI.	B. Vc. 8-23. Cicero, Pro. Archia.
		Virgil, Æneid, B. II W. 1-317.
		Ovid, Heroides, Epistles, V. XIII.
1883	Xen. Anabasis Book II.	Cæsar, Bel'm Brit'm. Cicero, Pro Archia.
	Homer, Iliad, Book VI.	Virgil, Æneid, B. V., VV. 1-361. Ovid, Heroides, Epistles V. XIII.
1884	Xen. Anabasis, Book II.	Cicero, Cato Major. Virgil, Æneid, B. V.
	Homer, Iliad, Book IV.	VV. 1-361. Ovid, Fasti, B. I., VV., 1-300.
1885	Xen. Anabasis, Book V.	Cicero, Cato Major. Virgil, Æneid, B. I.,
	Homer, Iliad, Book IV.	VV. 1-304. Ovid, Fasti, B. I., VV. 1-300.

ENGLISH.

1882	The Deserted Village. The Task, B. III.
1883	Marmion, with special reference to Cantos, V. and VI.
1884	Elegy in a Country Churchyard. The Traveller.
1885	Lady of the Lake, with special reference to Canto V. The Task B. V.

Articled Clerks

will be examined in the same years in the same portions of Ovid *or* Virgil as noted above. For Students-at-Law at the option of the candidate.

(Signed) JOHN CRICKMORE,
Chairman.

The report was adopted.

The report of the Finance Committee on the subject of a portrait of Chief Justice Osgoode, was received and read.

Mr. Smith moved, seconded by Mr. Read, That a half length portrait of Chief Justice Osgoode, of the size of those in the Convocation Room, be painted from the miniature in possession of Dr. Scadding, and that Mr. Berthon be employed to paint the same at a cost not exceeding $260, including the frame, which is to be approved of by the Finance Committee—Carried.

YEAS.	NAYS.
Crickmore,	Richards,
Read,	Martin,
Mackelcan,	Britton,
McMichael,	Irving.
Hoskin,	Maclennan,
Benson,	
Smith,	

The report of the Library Committee on the petition of the Osgoode Legal and Literary Society was received and read, as follows:—

REPORT.

The report of the Library Committee upon the subject of the Petition of the President, Secretary, and members of the Osgoode Literary and Legal Society, to the Benchers of the Law Society, which was referred to your Committee to consider, after an interview to be had between your Committee and a Committee of the Osgoode Society.

1. Your Committee beg leave to report that they have met a Committee of the Osgoode Society, and have been informed that the Constitution of that Society requires that all members thereof should be members of the Law Society.

2. That between the months of October and April, the Society, by way of winter session, meets generally once a week for the purpose of debate and discussion of legal and kindred subjects.

3. That it would be considered a boon by

the Osgoode Society, if the Benchers' Committee Room, in which the miscellaneous books of the Library are at present shelved—should be open to the members of the Osgoode Society, under circumstances which would enable them to refer to the books therein in aiding to prepare for their debates.

4. And further, that those members of the Osgoode Society who are from time to time appointed debaters in such Society should be allowed the privilege of taking out such books as they require for their debates for an evening, twice before their debate is to come up.

(2.) Your Committee have considered these proposals, and while they have agreed to recommend that, during the winter session (and to be limited to the current winter session for the present) the Benchers' room should be open to all members of the Law Society on the afternoons of Tuesdays and Fridays, between the hours of two and half-past five—they do not recommend any permission being given for the removal of any books from the Benchers' room on the occasions proposed.

(3.) But some members of Convocation having expressed the opinion that it is within the scope and aim of the Law Society to aid the objects of the Osgoode Society by providing certain literature bearing upon their discussions, your Committee think that some books might be provided for their use and placed more freely at their disposal than the expensive volumes which are to be found in the miscellaneous collection of the Law Society.

If Convocation approves of the freedom of access by the Osgoode Society to the Benchers' room on the occasions mentioned, your Committee will give the Librarian directious npon the rules to be observed while the room is so opened.

(4.) The Library Committee take this occasion of referring to Rule 127, sub-division 4, page 24:—"No book shall be carried out of the Library except under the circumstances authorized by order of Convocation, the observance of which there is difficulty in maintaining, and the existence of which is so often matter of complaint, as to suggest to your Committee the propriety of some modification, and your Committee suggests that the following exceptions be added thereto.

1. Where there are duplicate copies of a book in the Library, and any member of the Society apply for the loan of one of the copies for a night, or for temporary use in the Assize Court or County Court, the Librarian may in his discretion accede to such application.

2. When an application of the like nature is made for a book of which only one copy is in the Library, the Librarian may, if the court is actually in session in Osgoode Hall at the time, or if there is no likelihood of the book being required in the Library during the time the application covers, accede to the application, if in his discretion it appears reasonable and necessary.

3. That the Librarian keep a record of such temporary loans for the information of the Committee.

(Signed) On behalf of Committee,
Æ. IRVING.

The Report was then considered clause by clause.

Clause second, relating to access to the Benchers Committee room, was adopted.

Mr. Martin moved that clause three be referred back to the Committee, with instructions to report more fully as to the books proposed to be purchased, and their probable cost.—Carried.

Clause four was by leave withdrawn.

The report of the Finance Committee, refusing to grant the prayers of the Petitions of Messrs. G. A. Montgomery and J. B. Davis, was received, read, and adopted.

The report of the special Committee on the consolidation of the rules of the Society, was received and read.

Mr. Read moved that the draft of the consolidated rules be printed in galley form for the use of the Benchers, and distributed before the next meeting of Convocation; that the type be kept up, and that the consideration of the draft be postponed to the next meeting, with leave to the Committee to make such alterations in the draft before distribution as they may think advisable.—Carried.

Mr. Irving gave notice that he would at the next meeting of Convocation move for the rescission of the resolution authorizing the painting of a portrait of Chief Justice Osgoode, at a cost of $260.

Mr. Hoskin gave notice that he would at the next meeting of Convocation, namely, on the last Tuesday of December inst., introduce a rule in pursuance of sections 38 and 41 of the "Act respecting the Law Society of Upper Canada," enabling Convocation to deal with matters relating to the discipline and honor of the Bar, in such manner as to Convocation shall seem meet.

A letter from Mr. Neilson, in reference to the existing arrangement with the Toronto Telephone Despatch Company, was read and referred to the Finance Committee.

The order for the election of a Bencher to fill the vacancy created by the resignation of Mr. Miller, was read.

Mr. Britton B. Osler was elected in Mr. Miller's place.

The order for the election of a Bencher to fill the vacancy created by Mr. Crombie's seat having been declared vacant by non-attendance, was read.

Mr. Charles Moss was elected in Mr. Crombie's place.

The notice of motion given by Mr. Irving on behalf of the Treasurer, referring to prizes for examinations held by the Osgoode Legal and Literary Society, was read.

Mr. Crickmore moved the adoption of the following rule in pursuance of the notice, namely:

That the Osgoode Literary and Legal Society having arranged for a course of lectures, on various branches of Law, extending over the period from 23rd October, 1880, to 5th March, 1881, as follows:—

Criminal Law, by Mr. Delamere.
Partnership, by Mr. W. Mulock.
Mortgages, by Mr. C. R. W. Biggar.
Commercial Law, by Mr. J. McDougall.
Statute of Frauds, by Mr. G. T. Blackstock.
Fraudulent and Voluntary Conveyances, by Mr. C. Moss.
Constitutional History, by Mr. I. Campbell.
Real Property, by Mr. Ewart.

With a view to encourage the efforts and promote the objects of the Society, prizes be placed at its disposal on the following terms:

In case the Society arranges for a written examination at the close of the course open to all law students, to be conducted by not less than two of the lecturers, embracing at least three questions on each subject or twenty-four in all: of the competitors who obtain at least three-fourths of the aggregate marks obtainable in all the subjects, and at least one-half of the marks obtainable in each subject, the first shall be entitled to a prize of books to the value of $50, the second to a like prize of the value of $30, and the third to a like prize of the value of $20.

That the result of the examination shall be certified to the Treasurer by the examiners, and the prizes shall be awarded according to such certificate.

Mr. Blake moved that it be referred to a Select Committee, composed of the Treasurer and Messrs. Crickmore, Robertson, Mackelcan, Martin, Maclennan, McCarthy, and Ferguson, to consider and report a plan for the encouragement of legal studies by the Law Students in various parts of the Province, through the giving of prizes for examinations on the subjects of lectures, which may be delivered by members of the local Bars to the students of the locality.

Mr. Kerr moved, seconded by Mr. Britton,

That the printing of the journals separately be dispensed with, and that one hundred copies of the proceedings of Convocation, contained in the LAW JOURNAL, be ordered for the use of Convocation—Carried.

Convocation adjourned.

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

Chancery.] [Dec. 20, 1880.

MARTINDALE v. CLARKSON.

Dower.—42 Vict. c. 22.

Held, that the statute, 42 Vict. c. 22, sections 1, 2, 3, only apply to mortgages since it was passed.

McClive for the appellant.

J. H. McDonald for the respondent.

Appeal dismissed.

C. C. York.] [Dec. 20.

HOERNER v. KERR.

Married woman—Separate estate.

Held, reversing the judgment of the County Court, that the rents derived from real estate acquired between 1859 and 1872, by a married woman, married before 1859, are her separate estate.

Reeve for the appellant.

J. W. Kerr for the respondent.

Appeal allowed.

C. C. York.] [Dec. 20.

IN RE BEATTY, AN INSOLVENT.

Insolvent Act of 1875—Secured creditor—Proof.

Held, that a creditor, who holds security from the insolvent at the time of his insolvency cannot realize on the security and rank on the estate for the balance of the debt, as the as-

signee has thus no opportunity of taking the security at a valuation for the benefit of the creditors.

Merrit and *Blackstock* for the appellants.

Bain for the respondent.

Appeal allowed.

C. C. Northumberland.] [Dec. 20.

ROSS v. FITCH.

Attorney and client—Principal and agent.

W. & Co., attorneys, in the Province of Quebec, requested the defendant an attorney in the Province of Ontario, to take proceedings to collect the amount due on a promissory note, which certain clients of theirs, living in the Province of Quebec, were the holders. The defendant issued the writ in the name of B. & Co., and endorsed theron his own name as attorney. He, however, never had any communication with them, treating W. & Co. as his principals, and he credited them with the amount of the note when collected.

Held, that the plaintiff, who was assignee of B. & Co., was entitled to recover the amount of the judgment so recovered from the defendant; the rule, that the town agent of a country principal is not responsible to a client of the latter, not being applicable, as it was held that W. & Co. were the plaintiff's agents, to retain the defendant to act as their attorney, and the relation of attorney and client was, therefore, created between them.

C. Robinson, Q. C., for the appellant.

J. B. Clarke for the respondent.

Appeal dismissed.

C. C. Grey.] [Dec. 20.

TROUT v. MOULTON.

Promissory note—Double stamping.—42 Vict., c. 17, sec. 13.

The plaintiff objected to purchase a note from one C., on the ground that it was insufficiently stamped, whereupon C. affixed double stamps and then transferred it to the plaintiff, who did not notice that C. had omitted to cancel the stamps until some time afterwards, when his attorney mentioned it to him, when he at once double stamped it, and cancelled the stamps in accordance with 42 Vict., c. 17, sec. 13.

Held, that the evidence shewed that the plaintiff took the note in the full belief that it had been properly double-stamped by C., who was, at the time, the holder, and that he was entitled to cure the deficit by double stamping.

Bethune, Q.C., for the appellant.

J. K. Kerr, Q.C., for the respondent.

Appeal allowed.

Proudfoot, V. C.] [Dec. 27.

FINN v. DOMINION SAVINGS & INVESTMENT CO.

Fraud—Principal and agent.

The plaintiff, who applied to the defendants, through one W., their agent, for a loan, requested them, by his application, to send the money "by cheque, addressed to W." In accordance with their custom to make their cheques payable to their agent, and the borrower to insure the receipt of the money by the latter, they sent W. a cheque payable to the order of himself and the plaintiff. W. obtained the plaintiff's endorsement to the cheque, drew the money, and absconded. The plaintiff swore that he did not know that the paper he signed was a cheque, and there was no evidence to shew that he had dealt with W. in any other character than as the defendant's agent, through whose hands he expected to receive the money.

Held, affirming the decree of Proudfoot, V. C., restraining proceedings on the mortgage which the plaintiff had given the defendants as security for the loan and directing a reconveyance; that W.'s duty to the plaintiff was to endorse the cheque to him, or to see that the money reached his hands, and that the defendants, who had put it into his power to commit the fraud, must bear the loss occasioned by their agent.

Maclennan, Q.C., for the appellant.

Bethune, Q.C., *contra*.

Appeal dismissed.

QUEEN'S BENCH.

In Banco.] [Nov. 22, 1880.

NICHOLSON v. PHŒNIX FIRE INSURANCE CO.

Insurance—Grocery—Sale of liquor—Non-avoidance of policy.

Held, that by insuring a village "Grocery" an insurance company had notice that liquor might be sold therein; and that the non-dis-

closure of the fact did not avoid the policy.

W. Mulock for plaintiff.

Bethune, Q. C., *contra.*

MOSER v. SNARR.

Promissory note—Defence of forgery—Expert evidence—New trial refused.

In an action by an innocent holder against the endorser of a promissary note the defendant pleaded that the alleged endorsements were forgeries. On the first trial the jury disagreed, and on the second found for the plaintiff. No expert was called at either trial, and the court refused a new trial to enable such evidence to be given.

Bigelow for plaintiff.

Ferguson, Q.C., *contra.*

BEAUMONT v. CRAMP.

Chattel mortgages—Renewal.

Kissock v. *Jarvis*, 9 C. P. 156, as to the yearly renewal of a chattel mortgage approved and followed, notwithstanding the recent legislation since the decision of that case.

Ferguson for application.

COMMON PLEAS.

In Banco.] [Nov. 27.

STEELE v. THE GRAND TRUNK RAILWAY COMPANY.

Railways — Carriage of goods — Notice of arrival.

This was an action against the defendants for breach of contract to safely carry and deliver to the plaintiff certain goods delivered by the plaintiff to the defendants, to be carried from Hamilton to Toronto. The defendants objected that the action being in case, the plaintiff must fail, as they contended the evidence shewed that the plaintiff was not the owner of the goods, having sold them to one H.; and further that the plaintiff had omitted to give notice to the defendants within thirty-six hours after the delivery of the goods to him by the defendants, as required by the terms of the agreement under which the goods were alleged to have been carried.

Held, that the objections failed: for that the evidence showed, (1), that the plaintiff was the owner of the goods; and (2) that the goods were not safely carried to Toronto and there delivered to the plaintiff, and therefore the defendants could not set up the omission to give the said notice. The plaintiff was therefore held entitled to recover.

MacKelcan, Q.C., for the plaintiff.

McMichael, Q.C., for the defendants.

HENRY v. GILLEECE.

Will—Determination of Life Estate by Marriage or Death.

The question in this case was as to the construction of the following clauses in a will: "Third: I give and bequeath to my daughter-in-law, E. D., widow of my son W. D., deceased, the proceeds of the remains of my real estate, situate," &c. "To have and to hold the same to her use and support of my son W. D.'s children during her natural life, and so long as she remains the widow of my son, W. D.; and in the event of the death of my daughter-in-law then to my said grand-children. To have and to hold the same as long as they remain minors. Fourth: I give, devise and bequeath to my grandson, P.D., his heirs and assigns, *all* my real estate, being," &c., (the same land above mentioned.) To have and to hold the same to him and his heirs and assigns, to his and their use and behoof forever, subject to the condition set forth in the third clause of this instrument." E. D., the widow of W. D., after the death of the testator, and before the commencement of this suit, married again and was still living.

Held, that the proper construction of the above clauses was to give the land to the minors immediately on the determination of the mother's estate, whether it be by marriage or death.

Milligan (of Brampton), for the plaintiff.

MAYER v. THE GRAND TRUNK RAILWAY COMPANY.

Railways—Warehousing of goods—Condition as to liability.

The plaintiff shipped goods from Montreal to Toronto by the defendants' railway, which duly arrived at Toronto and was placed in the defendants' warehouse there. By one of the conditions under the heading, "Notices and Conditions of Carriage," endorsed on the back of the request note, signed by the plaintiff, and the

shipping receipt received from the defendants at the time of shipment at Montreal, as well as on the freight advice to be received by him on the arrival of the goods at Toronto, and specially referred to on the face thereof respectively, it was provided that the company should not be liable for any goods left until called for, or to order, and warehoused for the convenience of the parties to whom they belong, or by or to whom they are consigned, and that the warehousing of all goods will be at the owners risk and expense. The plaintiff, without having as he stated, read over the conditions on receipt of the freight advice had called at the warehouse, and received permission to leave the goods there, nothing being said about storage. The goods having been lost, the plaintiff sued the defendants to recover their value.

Held, that he could not recover; for that under the terms of the special condition, no liability, which, if at all, would be that of warehouseman, was imposed on the defendants.

Tilt for the plaintiff.

J. K. Kerr, Q.C., *contra.*

HARVEY V. PEARSALL.

Dower—Declaration claiming dower and damages after admission of right to dower—Sufficiency of pleading.

To a writ issued under the Dower Act with the statutory notice endorsed thereon, notifying the defendant to enter either an appearance with a denial of his being the tenant of the freehold or an appearance only; and that unless such appearance with or without such denial was entered, the plaintiff could sign judgment for the dower claimed with costs of suit; and further notifying the defendant that she claimed damages for the detention of her dower. The defendant filed, and served on the plaintiff's attorney, an appearance together with an acknowledgment that he was tenant of the freehold, and consented to the plaintiff having judgment for her dower therein, and that she might take the necessary proceedings to have the same assigned to her. The plaintiff thereupon filed and served a declaration claiming dower and damages.

Held, declaration bad, in claiming dower, which defendant had acknowledged the plaintiff was entitled to; but leave was granted to the plaintiff to amend on payment of costs, restricting the declaration to the claim for damages alone, so that the question could be determined whether in such case damages are recoverable.

Alan Cassels for the defendant.

VACATION COURT—Q.B.

Cameron J.] [Nov. 16, 1880.

REGINA, V. HOWARD.

Selling Liquor without License—Liability of Servant—R. S. O. c. 181—Power of Provincial Legislature.

The defendant, a servant of one Ward, the keeper of an unlicensed tavern, was convicted for selling liquor in her master's absence.

Cameron, J., held the conviction good, the case being undistinguishable in principle from *Regina* v. *Williams*, 42 U. C. R. 462, though he would otherwise have held the master alone responsible, under "The Liquor License Act, R. S. O. c. 181.

Quære; per Cameron, J., as to the power of the Local Legislature to limit, or authorize municipalities to limit, the number of licenses; and as to the effect of the decision of the Supreme Court in *City of Fredericton* v. *The Queen*, 3 Sup. Ct. 505.

Fenton for plaintiff.

A. MacNabb, *contra.*

CHANCERY CHAMBERS.

The Referee.] [June 21.

HILDERBROOM V MCDONALD.

Production before and after decree—Practice.

An order to produce is only made for the purposes of the hearing. After the hearing and a decree with reference to the Master, it will not be enforced for the purposes of the reference, although not complied with in the first instance.

The proper course is an application to the Master.

The Referee.] [September.

JELLETT V. ANDERSON.

Report—Confirmation of—Execution under.

A report must be filed before an execution can issue under it.

Where a decree ordered payment forthwith after the making of a report, an execution which was issued before the report was filed was set aside, but it was held that the report did not require confirmation under the wording of the decree.

REPORTS.

QUEBEC.

NOTES OF RECENT DECISIONS.

Q. B.] [Nov. 24.

GUY et al., Appellants, & THE CITY OF MONTREAL, Respondents.

Public street—Dedication by proprietor to the public—Prescription by open use to public.

A writing is not required to establish that property has been abandoned to the public for use as a public street; but the acts from which a dedication or abandonment can be inferred must be of a totally unequivocal character.

The fact that a street was openly used by the public without dispute for upwards of ten years as a highway, and that the corporation of the city exercised visible ownership by constructing a sidewalk thereon and filling in a swamp, more than ten years before the institution of an action, is sufficient proof of dedication by the proprietor.

BELL v. DOMINION TELEGRAPH CO.

Johnson, J.] [Nov. 30.

Telegraph message—Failure to deliver—Damages.

A Telegraph Company is responsible to the party to whom the message is directed, for negligence in failing to deliver a telegram. The fact that the sender did not repeat the message does not affect the rights of the person to whom the message is addressed.

GUILLAUME v. CITY OF MONTREAL.

CITY OF MONTREAL v. LAROSE.

Corporation—State of sidewalks—Responsibility of proprietor.

The Corporation of Montreal is liable for damages caused by the bad state of the public footpaths in the city, and the Corporation has a recourse en garantie for such damages against the proprietor of the premises opposite the footpath.

LAW STUDENTS' DEPARTMENT.

THE LAW SOCIETY AND ITS STUDENTS.

We refer our young friends to some information of considerable interest to them, to be found in the *resume* of the proceedings of the Benchers in Convocation (*ante*, pp. 17 &c.). The Benchers are, we are sure, desirous of lending a helping hand to the students, although their action some time since may have given rise to a somewhat different conclusion. Let it also be remembered that "Providence helps those who help themselves."

EXAMINATION QUESTIONS.

The following are some of the questions given at the Law Society Examinations, last Michaelmas Term. We shall continue the publication of these questions from time to time.

FIRST INTERMEDIATE.

Williams on Real Property.

1. A, B, C, and D were joint tenants of certain land. A conveys to E. By his will B devises to G. (1) By whom and (2) in what manner is the land now held?

2. What estates pass by the following conveyances: (1) Grant to A and his seed, (2) grant to A and the offspring of his body, (3) grant to A to have and to hold to him and his assigns forever, (4) grant to A and the heirs male of his body, (5) grant to A and his heirs forever.

3. What was the doctrine of the Court of Chancery as distinguished from that of the Courts of Law with reference to uses or trusts of land prior to the Statute of Uses? For what purpose was that statute passed, and what was its effect?

4. Apply the maxim that Equity follows the law to its mode of dealing with equitable estates, showing any limit there may be to its application.

5. What is an estate by entireties? What are the incidents of such an estate?

6. Can a man in any way convey lands to his wife? Explain.

7. What was formerly known as *general* and *special occupants*? How is it that there cannot now be estates held in such manner?

CERTIFICATE OF FITNESS.

Smith's Mercantile Law—Common Law Pleading and practice—The Statute Law.

1. In how far is community of profit a test of partnership? Discuss fully.

2. Give a short sketch of the duties of a factor towards his principal.

3. What is necessary to entitle a ship to the name and privilege of a *British vessel?* Explain fully.

4. What is meant by an *acceptance supra protest* of a bill of exchange? Explain fully the rights of an acceptor in such a case?

5. What statutory remedy is given to the person entitled to a lost bill or note? What remedy had he before the statute?

6. Define affreightment by charter party. Who is the proper person to execute the contract?

7. What is the necessity for the insertion in a marine policy of the words *lost or not lost?*

8. What remedy has a seaman for his wages? Answer fully.

9. Explain the nature and grounds of defence to an action under a plea of set-off, pointing out the cases to which such plea is applicable, and the limits of its applicability.

10. A landlord proceeds by action of ejectment against his tenant for nonpayment of rent, under a lease, obtains judgment, issues execution thereunder, which is duly executed, and the landlord placed in possession. What remedy has the tenant, if any, the lease being a valuable one with a long term unexpired?

CALLS TO THE BAR.

Equity Jurisprudence.

1. When are annual rests charged in accounts between mortgagor and mortgagee?

2. What was the general intent of the Statute of Uses; and to what three classes of trusts has it been held not to apply?

3. How will a Court of Equity deal with a trust created for an illegal purpose, where the illegal purpose has failed?

4. In what cases, and on what allegations of fact, will a Writ of Arrest be ordered?

5. Where a party, after making a contract for the sale of lands, dies intestate, and before payment and conveyance, who can receive the consideration money and execute the conveyance?

6. What is the effect where a legacy is given to a person under a particular character, which such person does not fill?

7. What is a bill of discovery, and for what purposes may such a bill be filed?

8. How is the doctrine of election applied in cases of (1) gift under a mistake of fact, (2) disability of beneficiary, (3) death of beneficiary before election?

9. What are the statutory provisions in Ontario amending 13 Elizabeth ch. 5, respecting Fraudulent Conveyances?

10. What is the mode of proceeding in cases where a trustee applies to the Court of Chancery for advice or direction in matters affecting the trust estate?

REVIEWS.

COMMENTARIES ON THE LAWS OF ENGLAND APPLICABLE TO REAL PROPERTY. By Sir William Blackstone, Knt. Adapted to the present state of the Law in Ontario, by Alexander Leith, Q. C., and James Frederick Smith, LL.B., of Osgoode Hall, Barrister-at-Law. Second Edition. Toronto: Rowsell & Hutchison, 1880.

It is safe to say that few announcements could have given greater pleasure to all classes of the profession, than that of a new edition of "Leith's Blackstone;" and when it became known that this long-felt *desideratum* was to be at length supplied, the appearance of the work was anxiously looked for and heartily welcomed The original work of Mr. Leith was published many years ago, and has long since been out of print. This latter fact of itself caused an immense amount of inconvenience, more especially to the many law students who have found themselves reduced (humiliating alternatives!) "to beg, borrow or steal" a book which was so indispensable an element in their legal training—to say nothing of the passing of "Intermediates" and final examinations. We are glad, indeed, that this state of things now belongs to the past, and that every lawyer and student can (and if he is wise, will) possess himself of an invaluable addition to his library in the new and excellent edition of this work which lies before us.

We made merely a brief editorial reference to this volume on its first appearance, believing that the great importance of its subject, as well as the variety and difficulty of the topics embraced within its range, merited a more careful

and extended study than a reviewer can in general give, to the volumes which he is called on to examine. We are well aware, indeed, how impossible it would be within the limits of one, or half a dozen articles, to attempt anything like an exhaustive survey of a book that treats of a subject so complex and manifold as the principles of Real Property Law. These principles are the very *arcana* of legal science, though strange to say, they have suffered more than any others at the rude hands of the "unlicensed conveyancer," who, "rushing in" with easy confidence where angels might well "fear to tread," has scattered broadcast over Ontario curious and interesting specimens of the working of *his* mind on this intricate head of Law. Trusting the readers of the LAW JOURNAL will pardon this allusion to a very "real" grievance, not unfrequently commented on in these columns, we will return to the subject more immediately before us by stating that it is not our purpose to attempt the exhaustive review of which we have spoken, but simply to call attention to the salient features of this adaptation of a portion of the great English jurist's *opus magnum* to Ontario law, and in particular to specify the more important points wherein the edition just published differs from the earlier one.

In this connection we may fitly notice the change in the title page, on which there is now associated with the name of the original author, that of Mr. James F. Smith, a gentleman long and favourably known in the profession as a sound and well-read real property lawyer. No one who examines with any care the edition now issued, and compares it with the former, will be surprised that Mr. Leith was anxious to secure the services of a coadjutor in so arduous a task as that of bringing up to the standard of the real property law of 1880, a work which was originally published in 1864, and it will be universally acknowledged that the result has proved Mr. Smith to be a worthy associate of one who is admittedly a "past master" in the conveyancer's craft.

During the period of sixteen years which has elapsed since the publication of the first edition of this book, the law of Real Property has been subject in a marked degree to that mutability which is characteristic of all human institutions. The axe of the Legislative woodman has been hewing vigorously at the time-honoured growths of legal precedent, and some of his weightiest strokes have been dealt at the old doctrines of the *jura rerum*. This tendency of Canadian legislation is commented on, not very sympathetically, by Mr. Leith in the preface to his learned work on the Real Property Statutes, published in 1869, since which date each successive volume of our Statutes has borne witness to its continued prevalence.

It would be foreign to our present object to discuss the merits or demerits of this tendency. The most enthusiastic advocate of change must admit (to quote from the "preface of the work just referred to) that very often the mutability of our laws is to be ascribed. . . . to their being framed with no sufficient appreciation of the existing law, or its mischief, or its remedy." The sturdiest champion of the ancient customs of the realm will not deny that the legal author must be content to take the law as it stands, and to remember, as a Mansfield or an Eldon must, that his province is to interpret, not to question the wisdom of senates. Such is the end at which the authors of the work now under review have aimed. In a brief and modest prefatory note, they refer to the many changes in the law, and the lack of any similar work applicable to this Province, as the chief commendations of their work to the favour of the profession. No more cogent reasons could be adduced for the publication of any law book, but we are sure that all candid critics will go further than this, and ascribe to their work no small share of that intrinsic merit which they seem disposed to disclaim.

The most superficial examination of the present edition can hardly fail to disclose abundant evidence of its marked superiority to its predecessor. To begin with, the typographical execution is vastly better. This of itself is a great boon to those who have found their appetite for what Mr. Joshua Williams calls "the ample and varied entertainment" of Blackstone in no wise stimulated by the manner in which the banquet is set forth in the closely printed pages of the first edition with its curious brackets and asterisks. While speaking of matters of this kind it will not be amiss to refer to the analytical table of contents prefixed to the present edition, which is a new feature worthy of cordial commendation, and to the excellent and well arranged index. The general arrangement of the work is much the same as in the first edition, the principal change made in this re-

spect being the relegation of the chapter on the Law of Descent from the central position it formerly enjoyed to one much nearer the end. This is not the only, nor the most important change which the authors have made in this famous chapter—we fear that some would suggest a slight change in the epithet. The long and intricate discussion of the law of descent at Common Law and under the Statute of William has been entirely omitted, and the attention of the student is directed exclusively to the Statute of Victoria. The authors state in a foot-note that they "have not thought it advisable to treat of the former law as by the lapse of time since 1851, and the effect of the present Statute of Limitations, a knowledge of that law is of little service." The work was designed, both by its original author and by its Canadian adapters as a manual for students, not a mine of learning for professors of the law, and the great drawback to its usefulness in this, its primary object, was the distressing effect of this chapter upon the young student, who too often found that his herculean efforts to master the intricate pedigree of the *English* "John Stiles," and the priorities of "his sisters and his cousins and his aunts," had left him but little strength or spirit to grapple with the much more practically important difficulties of the present law of descent in Ontario.

In instituting a comparison between the work under review, and its predecessor, the first noticeable point of difference will be found in the second chapter,—that treating of the laws in force in Ontario, and the authority for their application and for legislation by the Dominion and Provincial Parliaments. This important chapter which, like the chapter on descent already referred to, consists entirely of original matter, has been re-written, and greatly amplified. This has, of course, been rendered necessary by the momentous changes which have been effected in the political and legislative relations of Ontario by the British North America Act of 1867. Reference is made to the sections of that Act which treat of the nature and limitations of the legislative authority of our parliaments, and to the interpretation which these sections have received at the hands of our judges in cases such as *Smiles* v. *Belford*, and *Severn* v. *The Queen*. Much labour must have been expended upon this chapter, and the result must be most beneficial in giving the student, at the outset of his investigations, a clear idea of their ultimate standard and source.

We have not space at our disposal to linger over the many points of interest suggested by our comparison of the editions of 1864 and 1880, and must confine ourselves to a few of its more obvious results. This much however may be said, that the authors have nowhere slighted their work, which bears evidence throughout of careful and conscientious revision, and adaption to the present state of the law. In many subjects of the most vital importance, the mass of new matter to be incorporated has been so great that whole chapters have been recast or rewritten. We would refer more particularly in this connection to the chapter on "Freehold not of Inheritance" which contains a most valuable and suggestive *resume* of the present law of dower, and to that on "Estates upon Condition," which now contains 55 pages instead of 7, as in the first edition. This increase in bulk is due to a sketch, admirable in expression and arrangement, of the existing law of mortgage, and the principal statutes relating thereto. The treatment of this subject, the most important in a practical point of view that can engage the attention of the student of real property law, was wholly inadequate in the first edition, and the authors have nowhere shewn greater judgment, or met with more success, than extending the range of this chapter so widely as they have done.

Other chapters which have been to a great extent re-written are that on "Title by Alienation," in which we may specially remark the able treatment of the intricate questions turning on the construction of the "Married Woman's Property Act"—that on "Alienation by Devise," the greater part of which is very properly devoted to the consideration of the radical changes introduced by the Wills Act of 1873—and those which treat of the pre-eminently difficult and recondite subjects of title by prescription and conveyances by tenants in tail.

The authors say with truth that "much contained in the first has been omitted" in the second edition. We have already spoken of one important omission as being likely to meet with general approbation. We are not sure that the total excision of the chapter on "Alienation by Matter of Record and under Execution" will meet with equal favour in the eyes of the profession. It may be true, as the authors as-

sert, that the law on this subject should be looked on as "not appertaining to a work dealing chiefly with the general principles of the law of Real Property," but some will think that the great practical importance of this head of Law and the difficulties which attach to it, might have pleaded for the retention in the present edition, of some portions at least of Mr. Leith's learned and elaborate discussion. On the other hand, we think the authors might without much loss have dispensed with the leasing of advowsons and copyhold tenures, which is practically superfluous in this country.

We have given the barest outline of the scope and character of the important work, some of whose more interesting characteristics have been passed in rapid review. The authors, we are well assured, have no desire to claim infallibility, nor do they expect that criticism will fail to find some vulnerable points in their armour; but when every allowance has been made for possible errors and omissions in the treatment of a subject so vast and complete, there can be no question in the mind of any fair-minded critic as to the real and permanent value of the results of their labours.

CORRESPONDENCE.

Unlicensed Conveyancers, and unfair competition.

To the Editor of THE LAW JOURNAL.

DEAR SIR,—Having read the communication signed "S." on "Unlicensed Conveyancers" appearing in the LAW JOURNAL for this month, I would like, with your kind permission, to add a word in the same direction.

The question whether members of the legal profession, duly admitted and licensed, are entitled to protection against unlicensed competition may not be one of vital importance to some practitioners, but to the majority of them it is a matter of serious consequence. When it is considered that the regular practitioner has spent five of the best years of his life in a special course of legal training, that he has paid the Law Society $92 on primary examinations, and $174 on being called and obtaining his certificate to practise, that he has to furnish himself with a library of expensive books, and that he must pay a license fee of $20 every year, and maintain an office in which to do business, it does seem to me that your correspondent is justified in inferring something like an inducement, if not an actual promise on the part of that Corporation, acting through the Benchers, under the sanction of Statute law, that the persons whose money they so receive and whom they so license shall be entitled to the fees properly incidental to the profession, and that they shall be entitled to some protection against the competition of persons who pay nothing for license, and who have been at no expenditure of money or time in preparation for the work they undertake.

It is well understood that conveyancing in its several branches, including the drawing of deeds, mortgages, leases, wills, agreements, bills of sale, etc., forms a large part of a lawyer's work, particularly if he has settled in a country town or village. In your correspondent's village there are four unlicensed conveyancers, any one of whom can command more business than he, for the reason, no doubt, that as it costs them nothing they can afford (borrowing an expression from trade) to undersell him. It may be the "unlicensed" include the schoolmaster, a Justice of the Peace, the Division Court Clerk, and a clergyman or minister, as well as real estate agents, and "agents" generally. In early times, and in the back settlements, there may have been good reason for allowing any person who could write a fair hand, to do lawyers' work and collect fees, but the Province has now become so well settled, and the means of travelling and postal communication have been so much improved, that such reasons no longer hold good, and I think with "S." that a remedy should be looked for.

I believe the subject has been brought under the notice of the legislature in times past, but without effect, probably because legislators, even though they be lawyers, go for what is popular as a general rule; and if votes would be lost to the party by compelling every man who does conveyancing to pass an examination, pay fees, and take out an annual license, the legislators might prefer to retain the votes rather than amend the law. All, or nearly all, of the gentlemen composing the Government of Ontario are

lawyers, but it must be remembered they have attained positions in which they could be personally benefited but very little by such a law. I would suggest that "S." should request his representative in Parliament to ask for a return, as nearly as can be ascertained, of all instruments, registered or filed, within the past two years, which have not been drawn by professional men; as they almost invariably endorse their names on the instruments prepared by them, while others avoid doing so. There would be no difficulty in approximating the amount of work done for other persons by non-professional men. And if it should appear that the unlicensed practitioners bear the same proportion throughout the country to the licensed which they do in your correspondent's village, there is little doubt that some amendment in the law could be obtained; if not, the information would be very useful in enabling persons to form correct ideas upon the advisableness of entering the legal profession.

Another matter of which the profession may justly complain is the following: It is well known that various public officers (being lawyers) while in receipt of handsome incomes from permanent offices of public trust which they have accepted, probably as the reward of political services, continue the general practice of law in connection with their official duties. Amongst these are Clerks of the Peace and County Attorneys. They are provided with comfortable offices, free of rent, in the Court House. In their official duties they acquire an extensive knowledge of the affairs of people in the county, coming in contact with a much larger number of persons than the ordinary practitioner, and they enjoy a prestige and influence, especially in country places, attracting clients and business, which, but for the public office, would not have gone to them, and having an independent income from the public office they can afford to do work very cheaply, even *gratis* in many instances, rather than allow clients to go to a rival practitioner. We frequently see county attorneys leaving their counties and coming up to Toronto, taking briefs in the courts at Osgoode Hall in cases altogether outside their official duties. If I might venture to express an opinion, I would say that it would only be fair to the general profession, as well as to the public, that these gentlemen should be required to elect between serving the Crown in public office, and serving themselves and clients in their private practice, and if they prefer to take or retain office, that they should not be allowed to meddle with the general business of the profession.

X. Y.

December, 1880.

Barron on Chattel Mortgages.

To the Editor of THE LAW JOURNAL.

SIR.—I noticed in the December number of the LAW JOURNAL, "Lex's" letter on the above work, and I shall supplement it by pointing out another what seems to be a serious defect, which I have noticed in a cursory perusal of Mr. Barron's work.

At page 51 *et seq*, Mr. Barron devotes considerable space to prove the right of a mortgagee to take possession of the mortgaged goods at any time after the execution of the mortgage and before default, if the mortgage does not contain a re-demise clause; and he discusses at considerable length the old cases bearing on that point.

The case of *Bingham* v. *Bettison*, 30 U. C. C. P. 438, in which judgment was delivered by Wilson, C. J., in December, 1879, Mr. Barron evidently had not seen, as it reverses or distinguishes the cases cited in his work as authorities for his position; and holds that a mortgagee has no right to possession until default, even when there is no re demise clause.

I might also point out that the decision in *Hodgins* v. *Johnston*, 5 Ap. Rep. 449, settles all doubt as to the meaning of the words, "subsequent purchases" in sec. 10 of the Chattel Mortgage Act, which is discussed by Mr. Barron at pages 188-9.

I am inclined to agree with Mr. Barron on the point questioned by "Lex," as to registration of an assignment of a mortgage being notice to the mortgagor, though I agree with "Lex" in questioning the principle. In the case of *Gilleland* v. *Wadsworth*, 1 Appeal Rep. p. 82, it was unanimously held by the Court of Appeal, reversing the Judgment of the Chancellor (reported in 23 Grant, p. 547), that, though a mortgagor had paid the mortgage money in good faith to the original mortgagee, after an assign-

ment of which he had no notice (other than the registration), the land was still liable for the mortgage money in the hands of a person who purchased from the mortgagor, subsequent to such payment, and who assumed that the land was discharged, because he knew that the mortgagor had so paid the mortgage money. Mr. Barron makes no allusion to this case. Probably he did not see it.

While I take pleasure in according to Mr. Barron a just meed of praise for the work he has accomplished, I fear that an omission to refer to the latest authorities may be often misleading to young members of the profession. I doubt not that if a second edition of the work be necessary, it will receive a rigid and careful revision.

Yours, &c.

M. J. G.

FLOTSAM AND JETSAM.

The following is a list of Lords Chief Justices of the King's and Queen's Bench since 1756: Lord Mansfield, from 1756 to 1788, 32 years; Lord Kenyon, from 1788 to 1802, 14 years; Lord Ellenborough, from 1802 to 1818, 16 years; Lord Tenterden, from 1818 to 1832, 14 years; Lord Denman, from 1832 to 1850, 18 years; Lord Campbell, from 1850 to 1859, 9 years; and the Right Hon. Sir Alexander Cockburn, Bart., G.C.B., just deceased, from 1859 to 1880, 21 years.

LORD COLERIDGE, the new Lord Chief Justice of England, is the eldest son of the Right Hon. Sir John Taylor Coleridge, who was one of the Judges of the Court of Queen's Bench from 1835 down to 1858. He was born in the year 1820, and was educated at Eton, whence he was elected, in 1838, to a scholarship at Balliol College, Oxford. He was called to the Bar at the Middle Temple in Michaelmas Term, 1846, and went the Western Circuit. In 1855 he was appointed Recorder of Portsmouth, and 1861 obtained a silk gown, and was chosen a Bencher of the Middle Temple. In 1865 he was elected one of the members for the city of Exeter, and in the following year resigned his recordership. He was appointed Solicitor-General on the formation of Mr. Gladstone's Administration in December, 1868, and succeeded Sir Robert Collier in the Attorney-Generalship in 1871. In November, 1873, he became Lord Chief Justice of the Common Pleas, in place of Lord Chief Justice Bovill.

Cross-examinant: "Have you ever been in a penitentiary?" Coloured witness: "Yes sah." "How often have you been in the penitentiary?" "Twice, sah." "Where?" "In Baltimore, sah." "How long were you there the first time?" "'Bout two hours, sah." "How long the second time?" "'Bout an hour, sah. I went dar to whitewash a cell for a lawyah who had robbed his client."

THE WRONG LEG.—The Portland ADVERTISER tells the following story:—There was an eminent sergeant-at-law some years ago who had a cork leg that was a triumph of artistic deception. None but his intimates knew for certain which was the real and which was the sham limb. A wild young wag of the "utter bar," who knew the sergeant pretty well, once thought to utilise this knowledge of the sergeant's secret to take in a green, newly-fledged young barrister. The sergeant was addressing a special jury at Westminster in his usual earnest and vehement style, and the wag whispered to his neighbour: "You see how hot old Buzfuz is over his case; now I'll bet you a sovereign I'll run this pin into his leg up to the head, and he'll never notice it, he's so absorbed in his case. He's a most extraordinary man in that way." This was more than the greenhorn could swallow so he took the bet. The wag took a large pin from his waistcoat, and leaning forward, drove it up to the head in the sergeant's leg. A yell that froze the blood of all who heard it, that made the hair of the jury stand on end, and caused the Judge's wig almost to fall off, ran through the court. "By Jove, it's the wrong leg, and I've lost my money," exclaimed the dismayed and conscience-stricken wag, quite regardless of the pain he had inflicted upon the learned sergeant.

AT THE recent meeting of the Social Science Congress in Edinburgh, ladies took an active part in the discussion which arose upon the law as affecting women's rights of property and over their children.

The griffin on the top of the Temple Bar memorial bears a shield on which is inscribed, in letters of gold, the legend "Domine, dirige nos." There are not wanting profane persons who say that cabmen, van-drivers and others passing that way, will require this and other prayers to prevent their running into one another.

RULES AS TO BOOKS AND SUBJECTS FOR EXAMINATIONS, AS VARIED IN HILARY TERM, 1880.

Primary Examinations for Students and Articled Clerks.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

Articled Clerks.

Ovid, Fasti, B. I., vv. 1-300; or,
Virgil, Æneid, B. II., vv. 1-317.
Arithmetic.
Euclid, Bs. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

Students-at-Law.

See next issue of LAW JOURNAL.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

INTERMEDIATE EXAMINATION.

The Subjects and Books for the First Intermediate Examination, to be passed in the third year before the final Examination, shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery; O'Sullivan's Manual of Government in Canada; the Dominion and Ontario Statutes relating to Bills of Exchange and Promissory Notes, and Cap. 117, R. S. O., and amending Acts.

The Subjects and Books for the Second Intermediate Examination to be passed in the second year before the Final Examination, shall be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing, chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills; Equity, Snell's Treatise; Common Law, Broom's Common Law; Underhill on Costs; Caps. 49, 95, 107, 108, and 136 of the R. S. O.

FINAL EXAMINATION.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Smith on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Harris's Principles of Criminal Law, and Books III. and IV. of Broom's Common Law, Lewis's Equity Pleading, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

FOR CALL, WITH HONOURS.

For Call, with Honours, in addition to the preceding:—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Smith on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

SCHOLARSHIPS.

1ST YEAR.—Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Haynes's Outline of Equity, C.S.U.C. c. 12, C.S.U.C. c. 42, and Amending Acts.

2ND YEAR.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3RD YEAR.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I. and chaps. 10, 11, and 12 of Vol. II.

4TH YEAR.—Smith's Real and Personal Property, Harris's Criminal Law, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis's Equity Pleadings, Equity Pleading and Practice in this Province.

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Canada Law Journal.

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DIARY FOR JANUARY.

Sun....2nd Sunday after Epiphany.
Tues..Heir and Dev. sitt. ends. Second Intermedt'e Exam.
Wed. ..Second Intermediate Examination.
Thurs.First Intermediate Examination.
Fri. ....First Intermediate Examination.
Sun. ...3rd Sunday after Epiphany.
Tues. .Primary Examination.
Wed. ..Primary Examination.
Thurs.Primary Examination.
Sun. ...4th Sunday after Epiphany.

TORONTO, JANUARY 15th, 1881.

DEATH OF CHIEF JUSTICE MOSS.

It is with feelings of the greatest sadness that we record the death of Thomas Moss, Chief Justice of Ontario. He never quite rallied from a severe illness which attacked him about eleven months ago. His physician recently recommended him to try the effect of a change of climate, and he left Toronto last November for the South of France, accompanied by his wife and family. The accounts were at first re-assuring, but the decree had gone forth that he should never again see his native land. He died at Nice on the 4th inst.

His brother, Mr. Charles Moss, left for France on hearing of the alarming nature of his last attack, which in a few days terminated fatally. Our sympathies are with his sorrowing wife and children, left to mourn over a devoted and loving husband and father in a foreign land.

Whilst it needs no words of ours to tell of the kindly worth and pre-eminent abilities of the deceased, who was known far and wide throughout this Dominion, it will be a labour of love to speak hereafter at greater length of one who was beloved by all who knew him, and who shed the lustre of his great intellect on every department of labour in which he was engaged in his short but busy life.

At the request of several of our readers we have decided to continue the numbering of the volumes as before. The present volume will therefore be known as Vol. 17. We are glad to know from a rapidly increasing circulation and from many congratulations that our efforts to increase the usefulness and interest of this Journal have been fully appreciated.

THE S S collar, lately worn by Lord Coleridge, as Chief Justice of the Common Pleas, is said to be the same worn by Lord Coke. It may not be amiss here to mention, for the benefit of the unlearned in such matters, that the S S. chain, or collar, worn as a distinctive badge of honour by the Chiefs of the English Courts, is said, according to some old traditions, to be named from Sanctus Simplicius, a Christian judge and martyr of the time of Diocletian. It is usually passed down from retiring, or deceased chief justices to their successors. Lord Coleridge, we presume, takes his Common Pleas S S. with him to the Queen's Bench.

WE are in receipt of the first number of the *Canadian Law Times*, and we welcome it into the ranks of legal journalism. It is a small, but neatly got up, monthly, in magazine form, the first number containing some forty-two pages, single column, equal in amount of matter to about twenty pages of this journal. The contents of the first number are, "The law of allegiance in Canada," by Mr. Thomas Hodgins, Q. C.; part of an article by Mr. A. H. Marsh, discussing whether a power to sell implies a power to mortgage; some short edil torial notes, and a selection of head notes of some cases, old and new, on criminal law. We wish our contemporary a full measure of

success, and trust that the field may prove large enough for both of us.

IT is provided by section 5 of the D. C. Act, 1880, that in all suits in which "the sum sought to be recovered" exceeds one hundred dollars, the judge shall (if no agreement not to appeal) take down the evidence in writing. It has recently been held by His Honor Judge Sinclair, in *Bank of Montreal* v. *Statten*, that this duty is not required in interpleader issues, as the right of property in goods, and not the recovery of a money demand, is the question to be tried. We understand, however, that it is the practice of many experienced judges to take down the evidence in any important issues of the kind spoken of, so as thus to be on the safe side; and it is evident that such a course might, under certain circumstances, be conducive to the ends of justice.

THE JURISDICTION OF DIVISION COURTS.

The note of a decision of Judge Ardagh, referred to in our last number (*ante* p. 3) presents a point of much interest in connection with the D. C. Act of 1880. For, although we consider there is no ground for the claim of increased jurisdiction, yet, men high in the profession, and whose opinion is entitled to weight, take the contrary view. For our own part we entirely agree with the learned judge referred to.

The point is this: Under section 14 of the Act above mentioned, it is provided that in all cases where the jurisdiction is not contested or disputed by defendant, primary debtor, or garnishee, by means of a notice left with the clerk, the jurisdiction shall be considered as determined and established.

It is now attempted to be set up that a claim for an amount in excess of the sums mentioned in sections 54, &c., of the D. C. Act, may be recovered in this Court if no objection is made as required by section 14 of the late Act.

Although the subject has been already treated elsewhere, a few words here may help those not already convinced to arrive at what we submit is a proper conclusion.

It will be observed that section 10 of the Act in question provides that, "any suit *within the jurisdiction of the Division Court* may be entered, tried, and fully disposed of by *the consent* of all parties, in any Division Court."

After drafting this section no doubt it occurred to the framer of the Act to provide for two contingencies—the first, where the jurisdiction was objected to, and secondly, where it was not objected to. Section 11, evidently, is intended to cover the first case; for, though nothing is said about any dispute as to the jurisdiction, still, in view of the section presently to follow (treating of such dispute), it can only refer to a case where the proper objection has been taken.

Section 14, then, provides for the second contingency, and it is no doubt inserted to give legal effect to the saying that "silence gives consent." It is very improbable that a plaintiff could ever obtain the *consent* of a person against whom he was about to take legal proceedings to *any* step he (plaintiff) was about to take. So that it would be the duty of the judge before whom the case might be tried, upon its being shown to his satisfaction that that particular Court had no jurisdiction to order the transfer of the case to its proper Court, provided *no consent were filed.*

To do away with the necessity for this, and still with reference to section 10, section 14 was added; and we must therefore treat this latter section as if the words used in section 10, "any suit within the *jurisdiction* of the Division Court," had been imported into it. It must be clear, then, that the words "disputing the jurisdiction," in section 14, must refer to jurisdiction as *between the several Division Courts* in the province, and not as between a Division Court and a Court of higher jurisdiction—in short, a jurisdiction as to

place only. This is abundantly proved by the concluding words of the section—"the jurisdiction shall be considered as established, &c., as if the said suit had been properly commenced, entered, or taken in such Court." If a case is entered for an amount beyo nd the jurisdiction of the Division Court, it is not *properly* entered, &c.

"The jurisdiction of *any* Division Court," in the beginning of the section, seems to point in the same way. It is not said "the jurisdiction of the Court," which possibly might have a broader application, but "*any* Division Court," that is, *one of many*, and having a reference to other Division Courts.

Sections 11 and 14, then, are the necessary complements, as it were, of section 10, the one providing for the case where objection to the jurisdiction was taken, the other for the case where no such objection was taken.

Section 11 refers to the transfer of a case (where objection *has been taken* to the jurisdiction), "which might *properly* have been *entered* in some other Division Court." If this case was for an amount in excess of the jurisdiction it could not "properly have been entered" in *any* Division Court.

Section 14, then, must clearly refer to proceedings in a case which might "*properly* have been entered" in any Division. The same reasoning holds good with both.

Mr. O'Brien in his Division Court Manual, 1880, arrived at the same conclusion as that now formally decided by Judge Ardagh. (See O'B's. D. C. Manual, 1880, pp. 35, 36) In the course of his remarks on this section he says:

"A hasty glance at the words used in this section might lead to the supposition that the mere omission to give the notice spoken of in this section would establish and determine the jurisdiction to the court to the extent of the claim made, although that claim might be largely in excess of its jurisdiction. . . . . This section does not refer to the question of amount at all, and there is only, if anything, an implication to countervail a precise, express and exact definition of the general jurisdiction of these courts. It is much more reasonable to conclude that this section 14 refers only, as do those by which it is immediately surrounded, to the question of locality."

CHATTEL MORTGAGES.

In our November number we published, and again in this issue appears, a letter commenting on Mr. Barron's work on chattel mortgages. Criticism, when born of careful thought and study, is both useful and desirable, and this journal asks for and encourages such. As much good results from a good critic as from a good author; though the critic has great advantages over the author, and works on a different line. Care and prudence is particularly demanded when questioning an annotated work, for, if properly annotated, the fault (if any) will lie, not with the text of an author, but with the decisions of a court. And thus an annotated work (as we believe Mr. Barron's work only professes to be) disarms criticism, except to the extent that the same may be improperly annotated. Thus, for example, if "Lex" (*ante* vol. 16, p. 338), had read the cases referred to by Mr. Barron (which he said he had not) in support of the view "that registration of an assignment of a chattel mortgage was notice to the mortgagor," he would have had more difficulty in questioning the accuracy of that gentleman's work on this point. Whatever difference there may be between real and personal property in this respect, Mr. Barron has, in his support, no less an authority on the subject than Mr. Herman, who, at page 426 of his work, says: "an assignment of mortgage of personal property need not be recorded, but its registration is notice to the mortgagor." We are not prepared however at present to state any positive opinion on the subject.

Another correspondent, "M. I. G.," in our last number (and he writes as one who was

familiar with the subject) draws attention to the fact that at page 51 Mr. Barron "devotes considerable space to prove the right of a mortgagee to take possession of mortgaged goods at any time after execution and before default," and suggests that *Bingham* v. *Bettison* on this point should have been noticed. Beginning with *Porter* v. *Flintoff*, 6 C. P., ending with *Bunker* v. *Emmany*, 28 C. P., (and with *Ruttan* v. *Beamish*, 10 C. P., *McAulay* v. *Allen*, 20 C. P., and *Samuel* v. *Colter*, 28 C. P., in the interim), the law in Ontario was settled to be as the author annotates it. It is a pity, as "M. I. G." remarks, that the late case of *Bingham* v. *Bettison* was not referred to in the work, but we have ascertained from a reference to dates that this could not have been expected. It is not clear, however, that this case does decide what "M. I. G." contends for. If we read the text correctly, the case went off on another point, and on the effect of no redemise clause. The Chief Justice of the Court of Common Pleas said: "We do not interfere with the decision in *Porter* v. *Flintoff*, as it has been followed by the two later cases referred to * * * In any future case arising I am not prepared to say, *speaking for myself alone*, that I shall feel compelled to follow it." But, that this point has always been involved in considerable doubt, is shown by Mr. Barron at pp. 52, 53, and 54 of his work, where he quotes the dissentient judgments of Mr. Justice Gwynne, and gives the view, hitherto opposed to that of our Courts, held by many of the U. S. Courts.

On the question of the rights of subsequent purchasers our correspondent refers to the late case of *Hodgins* v. *Johnston*, 5 App. R. 449. A reference to p. 187 of Mr. Barron's book shows that the law there laid down is that set out in *Hodgins* v. *Johnston*, but theretofore undecided by any of our Courts, viz: "That the omission to refile a mortgage will not render it invalid as against a subsequent mortgagee with notice, or as against purchasers or mortgagees intermediate the original filing and the time prescribed for refiling." And the American cases there cited settling this point, will, in the work, be found as referred to by Mr. Kerr, Q. C., in his argument in *Hodgins* v. *Johnston*.

A desire has been expressed by some that the Legislature should pass an entirely new act governing conveyances on chattel property, and we are not prepared to question the propriety of such being done, although beset with many difficulties. A careful study of the various decisions on the act we are speaking of will show how, owing to piecemeal legislation, it is in many respects inconsistent.

We have another letter referring to the same subject from Mr. Kehoe, which will be found among the correspondence.

We notice in the *Irish Law Times* a commendatory notice of Mr Barron's book. The writer says, "We find the work satisfactory in a high degree, and on subjects relating to the general law common to this country, well worthy of collation with the text books familiar to practitioners here." We are not only glad that we have men in our profession who can write books worthy of commendation in the old country, where a strict criticism prevails, but that we have others in our midst who can intelligently and in a kindly spirit criticise them on points of doubt or difficulty.

THE JUDICATURE ACT.

We understand that a meeting has recently been held by the Middlesex Law Association looking to relief from the inconvenience and expense of Toronto agency business. We will however await further details before discussing the views set forth at the meeting. But in the meantime we must express our belief that the new clauses in Mr. Mowat's amended bill will give all the benefit which outside practitioners can reasonably look for, and that they will fully satisfy (as we think they ought) the great body of the profession

outside of Toronto. We refer to the clauses giving new and additional powers to County Judges to be exercised *in their several localities.*

We have received from a valued correspondent the subjoined remarks on the proposed Bill, in some of which we heartily concur, and all of which are entitled to consideration by the Legislature :—

Sections 7, 9, &c. These claims as to jurisdiction do not seem to be wide enough, being in effect limited to the jurisdiction, authority and power now exercised in pursuance of any "statute or law," and again "by any statute." Without going into a historical dissertation on the subject, it is clear that some considerable powers and functions of judges (such as the power of committing for contempt of Court) cannot be traced back to any statute, and can hardly be considered as powers given by the Common Law, but have sprung from the unwritten practice of the courts themselves. General words should be introduced to cover such powers.

Section 14. Appeals as to costs. This should be expressed to be subject to the terms of order L. which introduces exceptions to the general rule. The section is inartistically worded, and does not cover the case of an order which deals *not with costs only*, but with other matters, although an appeal might be attempted against that part only which related to costs.

Section 18, sub-section 4, appears to confer upon a defendant the right of claiming an equitable set-off concerning matters disconnected with the plaintiff's cause of action. The policy of this appears very doubtful, as it would encumber the pleadings and give many facilities to a defendant in delaying his creditor.

Section 19, sub-sec. 5. The construction of this sub-section appears to be awkward. To whom is the notice referred to, to be given—to the mortgagor, or to the tenants, or both?

Section 19, sub-sec. 6. Could not this clause be extended so as to embrace the case of a policy of insurance settled on the insured's wife or children under the Ontario statute? Cases in which such statutory settlement is disputed by an assignee in insolvency are of not infrequent occurrence.

Section 19, sub-sec. 10. The word "generally" is ambiguous; "lastly" would be preferable.

Section 21. Is this section intended to empower the courts to sit outside the Province? I presume not, and it should be so expressed.

Section 24. Are no qualifications to be named for the persons who may be appointed to act on commissions of assize?

Section 34. Is it intended to perpetuate the varying "course and practice" of the different Divisions in matters of appeals from orders made by a single judge? Surely if this amalgamation is to be more than a mere form. This is one of the points on which the practice may be made uniform.

Section 54, sub-sec. 3. The dual power given to the Lieutenant-Governor in Council and the Judges appears objectionable. The profession would be better satisfied, I think, if the power were left to the Judges alone.

Sections 58 & 59. What is to be the practice as to appeals from the decisions of County Court Judges acting as Official Referees? Section 58 says they shall be subject to appeal *as heretofore*, but the office now created is a new one.

Section 61, sub-sec. 2. For "penalty" (last word in sub-section) read "penalties."

Section 75, sub-sec. 2. What is the meaning of the words "not exceeding two-thirds of the *said sum*." If $1000 is meant by the expression "said sum," why not say, "not exceeding $666"?

Order VI. Rule 1. (p. 42). Surely this should read that service is not to be required where a solicitor agrees to accept service and *undertakes* to enter an appearance. It would appear from order VIII, Rule 11, that a breach of such an undertaking is to be punished by attachment. The present chancery practice of noting bill pro confesso is far more effectual and satisfactory.

Ib. Rule 2.—"*Wherever it is practicable*"—This is a most objectionable criterion and one which is sure to cause much trouble to the Courts in interpreting and applying it.

Ib. Rule 4. (p. 43), Is the necessity for taking out an order appointing a guardian ad litem to infant defendants done away with? It is presumed so from Order IX. Rule 2. (p. 48),—as to which rule the remark suggests itself, what is to happen if an appearance *has* been entered for an infant defendant by some other than the official guardian? Are the infant's interests to

be considered as sufficiently represented by any person who volunteers to appear for him?

Order IX. Rule 6, (close of rule) add "and subsequent interest."

Order XVI. Rule 2, p. 60, end of line 3—for "defendant," read "plaintiff."

Order XVII., Rule 2, p. 62.—Eight days is very short time to prepare and deliver defence, seeing plaintiff has no less than three weeks to reply, and a defendant in Chancery has now four weeks to put in answer.

Order XXVII., Rule 4, p. 70. The change from the Chancery practice by which an order for production is obtained on præcipe appears to me very objectionable. The order will be applied for and probably granted as of course, and in every contested case, but the cost of affidavit and application will be so much loss to the litigants. The affidavit will probably be a stereotyped form by the solicitor as to his belief that the other side has papers, &c. The multiplication of formal and unnecessary affidavits is very objectionable and runs counter to the current of modern legislation. All the variations from the present Chancery practice as to production are changes for the worse.

Order XXXV., Rule 2, p. 80. How are the shorthand writer's notes to be procured in four days after trial?

Order XXXIX., p. 86. Why not embrace this opportunity to remodel the law of executions, abolish the distinction between *fi. fa.* goods and *fi. fa.* lands and do away with the necessity of the *ven. ex*? Let there be one writ, a *fi. fa.* goods and lands, affecting and binding both moveables and immoveables—but not enforced against the lands until after the year. When the year is up, let the duty be cast upon the sheriff, if plaintiff desires lands to be sold, of procuring a proper description of the lands, of advertising them sensibly, and of conducting the sale with some regard to the interest of the defendant as well as of the plaintiff, and, generally speaking, in a mode somewhat similar to Chancery sales. The result would be a vast saving in expense, half the number of writs doing the work; and great reform would be effected by making the sheriff's sale a judicial proceeding, instead of a hole-and-corner piece of jugglery for giving the plaintiff the defendant's land for five dollars. There would be no necessity for postponing the sale, as no *ven. ex.* would be required. Of course, the sheriff's fees would have to be remodelled, to cover the additional expense of the proper advertising, &c., &c.

Order XLIX., Rule 7 (p. 95). The right of removal appears unnecessary and uncalled for, and may tend to embarrass a plaintiff.

Do., Rule 12. What is to prevent a clashing of the jurisdictions of the local master and the County Court Judge?

Do., Rule 13 (p. 96). Why not by notice instead of summons? See Order XLVIII.

Order L., Rule 5 (p. 97). I must protest against the introduction of this principle into our practice. Why should not the solicitor be permitted (as at present) to make his copies from his adversaries' papers? It is, in the first place, a large addition to the head of disbursements if one must pay for these copies, and may prevent many lawyers from being able to do so much for a poor client as they might otherwise do. My experience of the system, and of the complicated cross accounts between solicitors for copies, as it worked in England, leads me emphatically to condemn it. On the question of extracts alone, a lawyer may be driven to order a copy of a long account or document, the greater part of which is utterly worthless to him, simply because to order a certain limited extract would be to disclose his entire case (or some vital point of it), to his adversary.

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH.

IN BANCO.—MICHAELMAS TERM, 1880.

BERNARD v. COUTELLIER.

Malicious prosecution—Rejection of evidence—New trial—C. L. P. Act, s. 289.

In an action for malicious prosecution, on the opening of the defence, the defendant was called, and stated that he had learned some facts from certain persons upon which he had caused the plaintiff to be arrested; but on proceeding to state what he had heard, the learned Judge ruled that this was inadmissible, and that the persons who had told him these facts

should first be called. They were then called and examined, and afterwards the defendant gave his evidence. The jury found a verdict for plaintiff with $500 damages.

Held, by the Court, while disapproving of the ruling of the learned Judge at *Nisi Prius*, that nevertheless, no substantial wrong or miscarriage having been occasioned by the ruling, and the verdict being satisfactory, a new trial should be refused under s. 289 of the C. L. P. Act.

ARMOUR J. dissented.

J. Reeve, for plaintiff.

Bigelow, for defendant.

DAVIES v. FUNSTON.

Promissory note—Guarantee—Sufficiency of—Parol evidence.

The defendant, after a note had become due, and while it remained unpaid, endorsed upon it the following words:—"I guarantee the payment of the within note to Messrs. J. D. & Co., (the plaintiffs) on demand." The evidence showed that the consideration for this guarantee was the giving of time to one C., for whose debt to the plaintiffs the note was given as collateral security.

Held, that the evidence that the giving of time to C. was the consideration for the guarantee, did not contradict the latter, though it was expressed to be "on demand:" these words referred to a demand upon the guarantor after forbearance to press C.; and that such forbearance was a good consideration.

Per HAGARTY, C. J. Since R. S. O. c. 117, s. 10, such consideration need not appear on the instrument.

J. Reeve, for plaintiffs.

McCarthy, Q. C., for defendant.

WHITELAW v. TAYLOR.

Guarantee—Sufficiency of.

Plaintiff agreed with M. to repair a boiler in the latter's saw mill. During the progress of the work he received the following letter from defendant:—"As Mr. Morden's saw mill, at Bismark, is about to come into my hands right away, and as I am to assume expense of repairs to the boiler, be good enough to push forward the work to be done by you on the boiler as fast as possible, everything is at present at a stand still, waiting on you. Please push on the work and oblige, yours truly, R. Taylor." Plaintiff, without communicating with defendant, went on with the work. The contemplated work was not carried out.

Held, that the defendant had not rendered himself liable by the above letters for the price of the work done, and a non-suit was properly entered.

Bethune, Q. C., for plaintiff.

J. E. Rose, for defendant.

IN RE HIGH SCHOOL BOARD OF DISTRICT OF STORMONT, DUNDAS AND GLENGARRY, AND THE TOWNSHIP OF WINCHESTER AND IN RE THE SAID BOARD AND THE TOWNSHIP OF WILLIAMSBURG.

High School District—Alteration of boundaries—Continuance of liability for High School in severed part.

On 29th April 1878 High School District number four of the United Counties of Stormont, Dundas and Glengarry, being composed of the village of Morrisburg and the townships of Winchester and Williamsburg, the Board of Education of the incorporated village of Morrisburg, resolved that the sum of $7000 be levied on the said district to enable them to erect a school-house. On the 27th of May 1878 it was resolved that the Chairman of the Board be authorized to make a requisition on the municipalities forming the district, to provide their rateable proportion of the sum of $7000. In pursuance of this resolution, the Chairman, in writing under his hand and the seal of the Board, required the municipalities of the townships of Winchester and Williamsburg to raise their proportions. The request was served on the Reeve of Williamsburg on 18th July, and on the Reeve of Winchester on the 19th July. At a meeting of the Board on the 24th of June 1878, it was resolved that the Chairman should levy on these municipalities a further sum of $400 for High School maintenance, which was demanded on the 19th July 1878. On the 27th June 1878, in compliance with a request of a majority of the reeves of the County of Dundas, the Council of the United Counties passed a by-law enacting that district number four should be composed of the village of Morrisburg only. This by-law was quashed on the 5th February 1879; but under special circumstances the rule was re-opened and the by-law was on the 2nd February

1880 finally quashed in so far as it changed the limits of the High School Districts.

Held (HAGARTY, C. J. dissenting), reversing the decision of GALT J., that the municipalities of the Townships of Winchester and Williamsburg were still liable to contribute their proportion towards the erection of the High School.

McCarthy Q. C. for the appeal.

Bethune Q. C. contra.

CAMPBELL V. VICTORIA MUTUAL INSURANCE COMPANY.

Fire insurance—Misrepresentation—Incendiarism.

Action on a fire policy dated 21st May, 1879, on ordinary contents of a barn, which was at the time of the insurance, empty, and on other articles of personal property. In the application for the insurance, dated 13th May, 1879, plaintiff answered "No," to the question, "Is there reason to fear incendiarism, or has any threat been made?"

At the trial it appeared that one M. had threatened to beat the plaintift, and the latter being alarmed, had sent for the defendant's agent and had the premises insured, that he would not have insured but for his fear of M., and that he had sat up and watched for a week, and that he believed the premises had been set on fire, and that he had admitted this to an officer of the defendant's after the fire, which occurred on 28th Oct., 1869. At the time of the fire the barn contained some grain and hay, and a threshing machine, for the loss of which an action was brought. One of the conditions on the policy was, that if the assured "misrepresent or omit to communicate any circumstance, which is material to be made known to the Company in order to enable them to judge of the risk," the policy would be avoided.

Held, ARMOUR J. dissenting, that the plaintiff could not recover, on the ground that, the insurance having been effected solely on account of his fear of M., the answer to the above question was untrue.

Per CAMERON, J., the question is equivalent to "have you reason to fear, or do you fear incendiarism?" and, though the bodily threat does not furnish valid grounds for believing that incendiarism was to be feared from the person threatening, yet, since the insurance was effected on account of such fear, there was a clear misrepresentation in answering the question, and it made no difference that the property to be covered by the policy was not yet in existence.

Per ARMOUR, J., the word "incendiarism" commonly applies to buildings only, and its meaning ought not to be extended in this case to cover personal property. The property insured was not of an inflammable nature, and the question would be insensible if so extended. The question should be construed strictly with reference to some particular ground of fear; otherwise, the answer "No" referring to the first part only, viz: "Is there reason to fear incendiarism?" would be in every instance untrue; for every insurance is effected because the assured fears the happening of fire by accident, neglect, or design. And the evidence in this case showed that there was no such reason as, operating on the minds of the majority of prudent men, would cause them to fear incendiarism, and therefore the question was truly answered.

The question was also properly answered as to property intended to be covered by the policy, but not then in existence, as to which no fear could exist.

Lount, Q. C., for plaintiff.

McCarthy, Q. C., for defendant.

IN RE LEIBES V. WARD.

Prohibition—Deputy Judge—Jurisdiction of—Powers of to give judgment outside of Division to which his deputation refers.

Under the authority of the following deputation:—"Belleville, Ont., 24th July, 1880. I "hereby appoint E. B. Fralick, Esq., Barrister-"at-Law, as my Deputy to hold the 2nd Divi-"sion Court of the County of Hastings on Mon-"day the 26th day of July instant at the Town "Hall in the Township of Sidney.—T. A. Lazier, "Junior Judge, C. H.," the learned gentleman therein named tried the case at the time and place appointed but delivered his judgment according to a postponement made for that purpose on the 2nd August following at the judge's chambers, Belleville, outside the limits of the 2nd division, but within the county, without having named a subsequent day and hour for delivery thereof in writing at the clerk's office.

Held (1) That the word "Judge" in s. 20 of R. S. O., cap. 47, includes the Junior Judge; and

that the deputation was therefore valid. (2) That the proper construction of the same was "to hold the 2nd Division Court of the County of Hastings to be holden on Monday, &c.," and that his appointment continued until he had performed the purpose for which it was made. (3) That the effect was to clothe Mr. Fralick with all the powers of the Junior Judge during the time of his appointment, wherever he might be within the county. And the rule was therefore made absolute to rescind the order made by GALT, J. for a prohibition, CAMERON, J. dissenting.

G. B. Gordon, for the rule.

Holman, contra.

ROBINS v. CLARK.

Interpleader — Chattel mortgage — Defective registration—Fraudulent preference—R. S. O., cap. 118.

G. & E., bakers, on the 18th May, 1880, agreed with defendants that if the latter would advance them a quantity of flour they would give them a chattel mortgage on their horses, waggons, and baking utensils. Defendants accordingly delivered from day to day a quantity of flour to G. & E. On 26th May, the chattel mortgage not having been executed, the defendants wrote to G. & E. to have it done. The mortgage was accordingly drawn, covering the sales made, and was executed by the mortgagors only on 10th June, 1880, and filed on 12th. G. & E. absconded on the 12th, and on the 14th defendants took possession under a clause in the mortgage which allowed them to do so "in case mortgagors should attempt to sell, dispose of, or in any way part with the possession of the goods," and removed them to their own warehouse. The mortgage also contained a redemise clause. The jurat of the affidavit of *bona fides* was not signed by the commissioner. The defendants swore that they would not have advanced the flour if this security had not been promised, and that they had no intention of getting a preference over other creditors. The plaintiff's writ of attachment issued on the 17th June, and the sheriff seized the goods thereunder on the 30th June.

Held, that the mortgage must be considered as having been given when the contract to give it was entered into, viz., when the flour was first sold on credit on the 18th May, and therefore there was no preference of defendants, who became creditors only by this act.

Held, also, on the authority of *Risk* v. *Shemin*, 21 Gr. 250; and *Allan* v. *Clarkson*, 17 Gr. 560, that the agreement being one to enable the mortgagors to carry on their business, the transaction did not come within the mischief aimed at by R. S. O., Cap. 118; and the mortgage being therefore a valid security the defendants had the right to retain the goods, subject only to the liability to an action of trespass at the suit of the mortgagors for taking possession pending a demise to the latter.

J. E. Rose, for plaintiff.

E. D. Armour, for defendants.

REGINA v. MCALLEN.

Certiorari—Validity of, questionable on motion to quash conviction.

In showing cause to a rule nisi to quash a conviction, objection may be taken to the regularity of the certiorari, and a separate application to supersede it need not be made.

Where, therefore, on an application made after notice to the convicting justices for a rule for a certiorari the rule was refused, and on a subsequent *ex parte* application on the same material the rule was obtained, it was

Held, affirming the decision of GALT, J. that the notice of the first application would not enure to the benefit of the defendant in his second application, and that the certiorari was irregularly obtained for want of notice to the convicting justices; and a rule to quash the conviction was therefore discharged.

CAMERON, J. dissente', being of opinion that a substantive motion should be made to quash the writ of certiorari; and that the conviction being before the Court under a writ of certiorari unsuperseded, the validity of the conviction should be inquired into.

BARBER v. MORTON.

Bill of exchange—Principal and surety—Withholding of facts from surety—Discharge of latter.

The defendant agreed with plaintiff and P., the acceptor of a bill of exchange, that he would become responsible for the price of such goods as P. should order of the plaintiff. P. sent a written order to the plaintiff, stating

the number of articles he wished to purchase, and naming the prices he would pay for some of them. The plaintiff, having obtained the defendant's consent to fill this order, shipped P. a larger quantity of goods than was specified in the order. He also invoiced those as to which prices were specified at a higher price than that mentioned in the order, and thereafter without disclosing to defendant these facts, presented to him for signature a bill of exchange for the price of the goods shipped, representing to him that it was for the price of the goods ordered.

Held, that the defendant, being a surety, was entitled to be informed of the plaintiff's action in the premises, and that having been deceived by the plaintiff, he was discharged from liability.

HAGARTY, C. J. dissented.

Falconbridge for plaintiff.

E. D. Armour, for defendant.

HARPER v. DAVIES.

Wrongful dismissal—Contract for yearly hiring—Nonsuit—New trial.

Held, that an action for wrongful dismissal cannot be maintained on a verbal agreement for a hiring by the year, it being "an agreement not to be performed within the space of one year from the making thereof."

Where the plaintiff, in addition, claimed under the common counts a balance due partly for wages and partly on an account, and the jury gave the plaintiff a "lump sum" which would include some damages upon the count for wrongful dismissal, a new trial was directed.

J. Macgregor, for plaintiff.

Allan Cassels, for defendant.

REGINA v. WHELAN.

Certiorari—Effect of—Right to proceed for objects other than that for which certiorari was obtained.

Held, that a conviction once regularly brought into, and put upon the files of the court is there for all purposes; and that a defendant may move to quash it in whosesoever interest it may have been brought there.

Regina v. *Levecque*, 30 U. C. R. 509, distinguished.

Cattanach, for the Attorney-General.

Meek, for defendant.

IN RE BLAND v. ANDREWS; HOWARD, GARNISHEE.

Prohibition—Division Court Clerk—Garnishing money in hands of.

Semble, that money upon being paid to a Division Court clerk on the final disposition of a case, is paid in to the use of a suitor and is garnishable.

Per CAMERON, J. It does not become a debt from the Division Court clerk to the suitor till demand made.

Where the garnishee, who was clerk of the 1st Division Court of the county of York, had submitted himself to the jurisdiction and had paid the money in his hands into the 10th Division Court of the county, from which latter Court the summons issued, and since the judge of the Division Court had acted within his jurisdiction in determining whether the garnishee was indebted to the primary creditor and whether the debt was attachable.

Held, that the order of GALT, J. discharging a summons for a prohibition was right; and a rule *nisi* to rescind the same and for a writ of prohibition was discharged. *Dolphin* v. *Layton*, L. R., 4 C. P. D. 130 remarked upon.

Murdoch, for the Rule.

Williamson and *Patterson* contra.

COMMON PLEAS.

IN BANCO.—MICH. TERM, 1880.

CULVERWELL v. CAMPTON.

Principal and agent—Right to double commission.

An agent, employed by his principal to effect an exchange of property with another, cannot retain for his own benefit a commission received from that other in the transaction. But where the principal is aware that the agent has received such commission, and makes no objections to his retaining it, but with full knowledge of the fact negotiates with him for a settlement of the amount of his remuneration, he cannot, in an action for remuneration, set off the amount received by the agent from the other party.

J. E. Rose, for the plaintiff.

Bealy, Q. C., and *A. Cassels* for the defendant.

SKIRVING v. ROSS.

Slander—Medical practitioner—R.S.O. Ch. 142, Sec. 21.

A gentleman registered as a medical practitioner in Scotland, but who has neglected to comply with the provisions of R.S.O. ch. 142, sec. 21, is not in a position to maintain an action against a person for slandering him in his profession.

Bethune, Q.C., for the plaintiff.

Ball, Q.C., for defendant.

OLIVER v. NEWHOUSE.

Lease of farm and stock—Power to sell.

A father made a lease of his farm stock and implements of husbandry to his son for the term of five years determinable at will, with power to the son to sell or exchange the stock and implements in his discretion, so however that any goods sold should be replaced by others of equal value.

Held, following the older authorities, that the lease gave the son only a limited interest in the goods during the term; that such goods as he did not part with remained just as if no power to sell had been given; that all goods brought on the premises in lieu of the demised goods sold or exchanged under the power, became subject to the terms of the demise.

And even assuming that the property in the goods passed to the son, yet the lease having been determined by re-entry of the father, the residue of the original goods and the substituted goods became vested in him as the original goods had been before the execution of the lease, and an execution creditor who had recovered judgment after such re-entry had therefore no claim to the goods.

Ferguson, Q.C., and *McFadden* for the plaintiff.

McCarthy, Q.C. and *Milligan* for the defendant.

POSTMASTER-GENERAL v. MCCOLL.

Damage—Proximate cause of.

One Cæsar, a postmaster at Ramsgate, took from the mail matter in his charge, a letter containing several cheques, and having forged the endorsements, presented them to a bank, where they were cashed upon Cæsar's giving an undertaking as to the genuineness of the endorsements. On a special case as to the liability of the sureties of Cæsar in a bond conditioned that the postmaster "should not commit any theft, larceny, robbery, or embezzlement of, or lose, or destroy, or commit any malfeazance, misfeazance or neglect of duty, from which may arise any theft, larceny, robbery, embezzlement, loss or destruction of any money, goods, chattels, valuables or effects, or of any letter or parcel containing the same,

Held, that the bank on whose behalf the Postmaster-General prosecuted this action was entitled to nominal damages only, for the larceny of the letters; and could not recover for the loss occasioned by the payment of the charges, as the forgery and not the larceny was the proximate cause of the damage so resulting.

Semble that the doctrine of estoppel by executing instruments in blank is confined to negotiable instruments, and does not apply to deeds.

Hodgins, Q. C., for the Crown.

Robinson, Q. C., contra.

FISHER v. GRAHAM.

Breach of promise of marriage—Evidence.

In an action for breach of promise of marriage the evidence showed that the plaintiff who had been seduced by the defendant, had told her father that she was going to get married to the defendant; and that plaintiff's father had said to defendant "and you promised to marry her," to which the defendant replied, "I will marry her if it is mine." The jury found a verdict for plaintiff, with $200 damages.

Held, on motion for a non-suit, that the admissions of the defendant, and the statement of the plaintiff to her father, her apparent acquiescence, coupled with her probable desire under the circumstances to bring about a marriage, were sufficient evidence to go to the jury, of a mutual agreement to marry, though there was no actual promise proved on plaintiff's part. Where the promises were laid in the first count of the declaration to marry within a reasonable time, and in the second count to marry on a day now past, and the evidence given in support of them was that defendant had said he would "marry if the child were his," and that "he would not do anything until he got some part of the land off the old man and he would marry her then," that the child was his, and that he had admitted

some time before the alleged promise, that he had got 50 acres off his father's land and owned it,

Held, sufficient to sustain both counts.

B. H. Doyle, for the plaintiff.

Falconbridge, for the defendant.

NORTH OF SCOTLAND CANADIAN MORTGAGE CO., (LIMITED) V. GERMAN.

Mortgage—Release of equity of redemption.

Where a mortgagor, unable to pay his interest, gave a release of his equity of redemption to the mortgagees by ordinary short form "to save the costs of a sale," and it was proved that if there were any surplus after a sale it was to have gone to defendants.

Held, (GALT, J. dissenting) that there was no merger of the mortgage debt.

Per WILSON C. J. From their liability to account for the surplus the plaintiffs had, from being mortgagees strictly, become trustees substantially.

Per OSLER, J. Whether there was a merger of the mortgage debt is a question of intention; what the intention of the parties was is a question of fact.

Bethune, Q. C., for the plaintiff.

Crickmore, for the defendant.

MITCHELL V. MCDUFFY.

Illegal distress—Trespass—Damages—2 W. & M., Sess. I, ch. 5.

Defendant leased land to plaintiff for a term, during which the latter was to make improvements, and at the end of the term the amount of rent payable to the defendant was to be fixed by arbitration. Defendant distrained during the term. The action was tried twice in each case, the jury finding for the plaintiff and assessing damages at double the value of the goods.

Held, that the defendant having no right to distrain on account of there being no fixed rent agreed upon, he was a trespasser and liable to damages, but not to pay double the value of the goods; as it was not a case coming within the Statute 2 W. & M., Sess. I. ch. 5, which refers to a wilful abuse of the power of distress; and it could not be said that in this case there was nothing due, *i. e.*, payable, until the accounts had been taken by arbitration.

J. K. Kerr, Q. C., for the plaintiff.

Ferguson, Q. C., for the defendant.

NEILL V. THE TRAVELLERS' INSURANCE COMPANY.

Accident policy—Violation of conditions—Death from voluntary exposure to unnecessary danger.

I. N. being insured with defendants against death by accident was killed by a railway train in the yard of the Northern Railway Company at Toronto, which it was unlawful for him, not being an employee of the company, to enter, and into which he had unaccountably driven. He was last seen by a witness who watched him driving over and among a network of tracks, and who, while he was entangled in the switch gate, warned him not to go further as he would be killed, to which deceased made no answer. By certain of the conditions of the policy it was stipulated that it should not "extend to any bodily injury where the death or injury may have happened in consequence of voluntary exposure to unnecessary danger, hazard or perilous adventure, or of violating the rules of any company, etc., or while engaged in or in consequence of any unlawful act." The jury found a verdict for plaintiff.

Held, on motion for a nonsuit pursuant to leave reserved, that the plaintiff could not recover and a non suit was entered.

Ferguson, Q. C., and *Watson*, for the plaintiff.

McCarthy, Q. C., and *Creelman*, contra.

MCCARTHY V. ORBUCKLE.

Ejectment—Mesne profits—Improvements under mistake of title—Referring back to Master in Chancery.

In an action of ejectment where the defendant claims a lien for improvements under R. S. O. cap. 95, sect. 4,

Held, that the plaintiff is entitled to account of rents and profits to be set off against the value of the improvements.

Where it was referred to the Master in Chancery to ascertain the value of the defendant's improvements and he simply reported their value, being of opinion that under the terms of the rule he could not take an account of mesne profits,

Held, that the court had power to refer the matter back to him for this purpose.

SELSBY V. THE CORPORATION OF THE VILLAGE OF DUNNVILLE.

Municipal Corporation—Contract not under seal—Liability of, for acceptance of fire engine by resolution of Council not under seal.

The defendants having invited tenders for the supply of a steam fire engine accepted the plaintiff's tender, whereupon an engine was forwarded for acceptance subject to test. A by-law passed by the council to raise the necessary amount to pay for it was submitted to the ratepayers and carried, but being informal, was repealed, and another by-law was submitted to them and rejected. Before the second by-law was voted upon, the engine arrived and was tested on behalf of the defendants, placed in their engine house, subject however to customs duty, and accepted by resolution of the council in writing not under seal.

Held that the plaintiff could not recover because: (1) It was not a common, ordinary, or insignificant matter for which it was not worth while to contract under seal. (2) Because there had been no acceptance under seal. (3) Because there was no satisfactory evidence of acceptance in any manner. (4) Because the ratepayers for whose benefit the intended contract was made had repudiated it, and a verdict was entered for the defendants.

Mackelcan, Q.C., for the plaintiff.

A. Bruce (Hamilton), for the defendants.

STEVENSON V. CITY OF KINGSTON.

Salaried attorney—Right of to recover costs from opposite party.

The defendants paid their solicitor a fixed salary to cover all his professional services to the city, exclusive of counsel fees and other disbursements paid by him; the solicitor to have the right to costs from parties against whom the corporation should succeed, and to be entitled to disbursements only when he should fail.

The defendants entered judgments against the plaintiff and the usual costs were taxed. A rule was taken out on behalf of the plaintiff to refer back the bill with a direction to the deputy clerk to disallow all costs but disbursements.

Held (WILSON, C.J., dissenting), that inasmuch as costs were awarded to the defendants who, under their agreement, were not liable for these specific costs to their attorney, disbursements only should be taxed; following *Jarvis* v. *G. W. R. Co.*, 8 C.P. 280.

Holman, for the plaintiff.

Riordan, for the defendants.

DANCY V. BURNS.

Shipping—Stranding to save crew—General average.

Where a vessel was driven on a lee shore, and becoming disabled so that she could not work off, and after the anchors had been let go and had dragged until the vessel began to pound on the bottom, the master, with the view not of saving the cargo, but of enabling the crew to escape, headed her round to the shore, and in consequence of the stranding the cargo was saved.

Held, that the cargo was not liable to general average.

Falconbridge, for the plaintiff.

Ferguson, Q. C., for the defendant.

ONTARIO CO-OPERATIVE STONE CUTTERS' ASSOCIATION V. CHARLES ET AL.

Co-operative association—Power to incur credit—Necessity for agreement under seal.

Held, that sec. 15 of R. S. O., ch. 158, which requires the business there referred to to be a cash business, while appropriate to the case of buying and selling goods and other property, does not apply to an association formed for the purpose of carrying on a "labor" or a "trade," which can enter into contracts necessary for and incidental to such trade or labor.

To a declaration alleging that the plaintiff entered into an agreement with the defendants to perform certain stone work which they partly performed, and averring as a breach that the defendants had prevented them from carrying on and completing the work, whereby, etc., the defendants pleaded that the agreement was not under seal.

Held, that the plaintiff being a trading corporation enough was not shown to make the absence of a seal fatal to the validity of the agreement.

Falconbridge, for the plaintiffs.

J. E. Rose, for the defendants.

SMALL V. RIDDLE ET AL.

Action for benefit of joint endorser—Partnership—Contribution—R. S. O. ch. 116, secs. 2, 3, 4.

A promissory note made by the president and

secretary of a syndicate, formed for the purpose of completing the Hamilton and Dundas Street Railway, in favor of O., S. and the defendants, was by them endorsed to the Canadian Bank of Commerce. On the day the note fell due O. and S. paid the same, S., at the time of so doing, directing the bank to endorse it to the plaintiff, who gave no consideration therefor. This was accordingly done, and the present action brought against the defendants as endorsers of the note.

Held, as a fact that S. by his payments, intended to satisfy the note; and therefore the plaintiff by this endorsement to him took just such rights as S., after such payment, had with respect to the note, and that inasmuch as the defendants were co-partners with S. in the above mentioned railway undertaking, and the note was made for a purpose directly relating to and not in a matter merely collateral to the partnership, they were not liable to S. in an action against them as endorsers, and so therefore the plaintiff could not recover against them.

In an action by a third person holding for the benefit of a joint endorser against his co-endorsers who are sued as endorsers, such joint endorser cannot claim contribution under R. S. O. ch. 116, secs. 2, 3, and 4, for he should sue each of the defendants separately for his share of the contribution, and not the two jointly, and should also declare specially for that proportion of contribution, and should not sue the defendants as endorsers for the full amount of the note.

Held, further, that the statute above referred to, is not applicable to partnership transactions.

Ferguson, Q. C., for the plaintiff.

Bruce, for the defendants.

JOHNSTON v. CHRISTIE, J. SKINNER, P. SKINNER & FOYLE.

Trespass to land—Title.

Plaintiff agreed in writing on 18th Nov. 1878, with one Q. agent for St. G. to purchase the land in question. Q. had a power of attorney from his principal to protect and lease but not to sell and convey lands. Plaintiff paid one instalment only of his purchase money to Q. who said he had forwarded it to St. G. who had ratified the bargain. On the Monday after the 18th Nov. 1878, plaintiff went on the lot with Q's permission, and cut and removed some timber The defendants, Christie and J. Skinner, cut timber on the land under a mistake as to boundaries, but after the limits were ascertained offered plaintiff compensation for this, though Christie swore he meant his offer to be for plaintiff's interest in the lot. They also had offered to buy timber from the plaintiff.

Held that there was sufficient evidence of title to constitute the acts of entry made by the plaintiff on the land constructive possession.

It was objected that being in default to St. G. on his agreement and time being made thereby essence of the contract, the plaintiff's title had expired. But,

Held that the defendants, not claiming under St. G. could not set up his right to avoid the agreement.

It was suggested that St. G. might still be in a position to bring an action for the same trespasses, and it was therefore ordered that the rule should not issue until a release from St. G. to the defendant against whom the verdict went as to the trespass in question, should be filed.

The proceedings were irregular as against J. Skinner and Foyle and the verdict against them was set aside.

Lount, Q. C. for plaintiff.

McCarthy Q. C. for defendant.

CARTER v. HATCH.

Investing money on mortgage—Breach of duty—Onus of proof—Pleading.

It is *prima facie* a breach of duty in a person entrusted with money, to invest on the security of a second mortgage, however good that security may apparently be; and the *onus* is on the defendant to prove that the plaintiff authorized such investment. Where the agent to invest derives his profits, not from the lender, but from the borrower, the proper mode of stating the consideration is to aver, that in consideration the plaintiff *would deliver to the defendant* the sum &c. to be invested by him for the plaintiff upon good and sufficient security upon real estate, *so as to enable defendant to charge the borrower of the money for his services in the premises*, the defendant promised, &c.

Dunbar, for plaintiff.

J. E. Rose, for defendant.

McMASTER, & Co., & THE BANK OF OTTAWA v. GARLAND.

Interpleader—Equitable assignment of proceeds of sale of goods—Registration of—R. S. O. cap. 119.

B., at the suggestion of McMaster & Co. his creditors consigned to S. S. & Co. for sale a quantity of goods. To enable him to do this McMaster & Co., advanced him $250 to pay certain claims, and S. S. & Co. accepted his draft for $800 on 31st. May, 1880, which the Bank of Ottawa discounted. B, on the 28th of May, 1880, sent to McMaster & Co. an order for $2,159 upon S. S. & Co., to be paid out of the proceeds of the goods, which S. S. & Co. by letter on 30th May, 1880, agreed to pay, if there were sufficient funds after paying their own charges and commission. On the 31st of May, 1880, S. gave an order in favour of the Bank of Ottawa upon S. S. & Co., for $1461.47 to be paid out of proceeds of sale, and S. S. & Co. were notified by telegram. The goods were advertised for sale on 11th June, 1880. On that day by virtue of a writ of *fi. fa.*, dated 8th June, 1880, against the goods of B., at the suit of defendants, the sheriff took possession of the goods and interpleaded. The defendants on ascertaining the amount of S. S. & Co's. claim, paid it.

Held, that by so doing they had not released the goods from the lien of S. S. & Co. for the benefit of other creditors, and to their own prejudice ; bnt that S. S. & Co. thereafter held the goods for the defendants' benefit to the extent of their claim, just as they did for the other creditors on their respective orders; defendants were therefore entitled to rank first for the amount, and then the plaintiffs according to their priority.

It was contended for defendants that the orders given to the plaintiff were within the Chattel Mortgage Act, and should have been registered ; but *held*, that the actual delivery of the goods by B. to S. S. & Co., followed by the actual and continued change of possession dispensed with the necessity for registration.

Per OSLER J.—Under the authority of *Paterson* v. *Kingsley*, 25 Gr. 425, such orders amount to equitable assignments, and are not within the spirit of the act.

J. K. Kerr. Q. C., and *W. R. Mulock* for McMaster & Co.

Beaty, Q. C., and *A. Cassels*, for the Bank of Ottawa.

McCarthy, Q. C., for the defendant.

REID v. MAYBEE.

Malicious arrest— Reasonable and probable cause—Termination of proceedings before magistrate—Endorsement of warrant—New trial.

Defendant went with plaintiff to get draft cashed for the latter; and during the journey the plaintiff boasted that he was going to get a much larger sum from Scotland, whence this draft came. It did not appear that the plaintiff made this statement with a view to obtaining credit with defendant. He deposited money with defendant, and obtained goods from him for some time, which were charged against the funds in deposit, and largely exceeded his deposit. Defendant had him arrested for obtaining goods under false pretences, thereby hoping to have his account settled. The plaintiff was allowed to go on his own recognizance to appear the next day, but, being unable, did not appear, and the charge not being pressed, the matter dropped, and the magistrate made his order, not in writing, for a discharge.

The warrant was issued in the united counties of Northumberland and Durham, and was endorsed by a magistrate of the county of Peterboro, as follows: "This is to certify that I have endorsed this warrant to be executed in the county of Peterboro," and it was executed in the latter county. There was no evidence of any proof to the Peterboro magistrate of the handwriting of the issuing magistrate, and the endorsement did not follow the schedule K, of 32 and 33 Vic. c. 30, sec. 23. A verdict was entered for the defendant at the trial.

Held, that on account of the warrant being defective the arrest was illegal, and the plaintiff was entitled to recover in trespass.

Held, also, that by the production of the papers and proceedings before the magistrate, it apparently appeared that the proceedings on the warrant had terminated.

A new trial was therefore directed

Kerr, Q. C., (Cobourg,) for the plaintiff.

J. E. Rose, and *Ketchum*, for the defendant.

COMMON LAW CHAMBERS.

Cameron, J.]

EVANS v. SUTTON.

Division Court—Prohibition—Jurisdiction—Proof of claim.

The plaintiff residing within the limits of the Ninth Division Court of Wentworth sued, in that Court, the defendant who resided in St. Catharines, for a cause of action which partly arose in St. Catharines. The defendant put in a notice of defence disputing the claim and the jurisdiction of the Court. At the trial the defendant did not appear, and the Division Court judge gave judgment for the plaintiff for the full amount, without requiring any proof of the claim.

Held, that a prohibition should issue, and that the plaintiff should pay the costs.

Held, also, that the Division Court judge should have required the plaintiff to prove his claim.

Cameron, J.] Dec., 1880.

PECK v. SHIELDS.

Pleading—Insolvency.

Declaration:—1. The common counts; 2. That the defendants were guilty of fraud within the meaning of the Insolvent Act of 1875, in that they purchased goods knowing themselves to be insolvent; "and the plaintiffs claim four thousand dollars." Pleas:—(to first count) 1. Never indebted; 2. A deed of composition and discharge signed by a majority of the creditors and three-fourths in value; 3. (to second count) Not guilty; 4. That defendant did not purchase on credit as alleged; 5. That the said contract was not made in Canada; 6.(—to the whole declaration)—That before suit the plaintiffs released the defendant, by deed.

Held, on an application to strike out the pleas, that they were good.

Leave given to the plaintiffs to reply fraud to the second plea.

Rose, for plaintiff.

Aylesworth, for defendant.

Wilson, C. J.]

REGINA v. CLENNAN.

Certiorari—Conviction—32-33 Vict. ch. 31, sec. 25 D.

The defendant was convicted before a magistrate for that he did, in or about the month of June, 1880, on various occasions, knowingly and fraudulently, sell and supply to M. W., the possessor of a cheese factory, a large quantity of milk from which the cream had been taken, for the purpose of being manufactured into cheese contrary to the statute, and a fine was inflicted "for his said offence."

Held, that the conviction was bad under 32-33 Vict., ch. 21, sec. 25, D., as showing the commission of more than one offence.

RE F. & J., ATTORNEYS.

Wilson, C. J.] [Oct. 29, 1880.

Ejectment by mortgagee—Costs.

L, being the holder of a mortgage upon which an instalment of interest was due, instructed his attorney "to take legal proceedings on the securities unless the interest was paid on the 12th April." The mortgagor called on the 12th April, and told the attorneys that he intended shortly to pay off the mortgage, and hoped no costs would be incurred. On the 15th April the attorneys issued a writ of ejectment and notice of sale, and served them on the mortgagor on 23rd April, when he called to pay off the mortgage. They also refused to take the principal money.

Held, that the attorneys were entitled to the costs of the ejectment suit, but to no other costs whatever.

Crickmore, for attorneys.

Aylesworth, for mortgagor.

Cameron, J.] [Nov. 6, 1880.

PATULLO, *et al.*, v. CHURCH.

Attorney and client—Costs—Taxation.

Where a client applies for taxation of an attorney's bill after the expiration of a year from its delivery, he should show such circumstances as would have justified a reasonable man in refraining from seeking such taxation, or that he was prevented by some unreasonable cause. Where judgment had been signed against the client in an action on the bill during the pendency of negotiations for a settlement, this was

Held, a sufficient reason for opening up the judgment and directing a taxation.

Clement, for the attorneys.

Aylesworth, for defendants.

CHANCERY CHAMBERS.

Proudfoot, V. C.] [June, 1880.

RE. TOTTEN.

Taxation—Charges for attendances on—G.O., 608.

A master or a single judge has no discretion to allow more than $1.00 fee for attendances on the taxation of a bill of costs between solicitor and client, or party and party, the tariff being fixed at that rate by G. O., 608.

Boyd, Q. C., for appellant.

Hoyles, for Totten.

Proudfoot, V. C.] [June.

DODGE v. CLAPP.

Commission under G. O., 643—How apportioned—Objection to, when may be raised.

In partition and administration suits the commission in lieu of costs should be divided into equal fractional parts, and the parts allotted to the solicitors in proportion to the amount of work done by, and the responsibility imposed upon them.

Objections to the commission allotted may be raised on a motion for distribution without previous notice of appeal being given.

Plumb, for infants.

Hamilton, contra.

RAE v. TIME.

The Master.] [October.

Costs — Counsel fees before Master sitting for judge—Equity jurisdiction of County Court.

The County Court on its equity side had power to grant an injunction in any case coming within its jurisdiction. The fact of title to land coming in question did not oust the jurisdiction of the County Court on its equity side. The same fees are to be taxed to counsel appearing before the Master, taking evidence in place of a judge as before the Court itself.

Hoyles, for plaintiff.

Fisher and *Cassels*, contra.

LAW STUDENTS' DEPARTMENT.

HILARY TERM EXAMINATIONS.

Students are reminded of the days of examination as follows:—

Second Intermediate—Tuesday and Wednesday, January 18th and 19th, 9 a. m.

First Intermediate—Thursday and Friday, January 20th and 21st, 9 a. m.

Primary Examinations—Junior Class Students and Articled Clerks—Tuesday and Wednesday, January 25th and 26th, 9 a. m.

Graduates and Matriculants of Universities—Thursday, January 27th, 10 a. m.

The Final Examinations have been fixed for the following days.

Attorney—Wednesday, February 2nd, 9 a. m.

Call—Thursday, February 3rd, 9 a. m.

Call with Honours—Friday, February, 4th, 9 a. m.

The new rules respecting Scholarships and Call with Honours will come into force in the ensuing term of Hilary.

OSGOODE LITERARY SOCIETY.

The request of this Society for the use of the Miscellaneous Library at Osgoode Hall for Students on Tuesday and Friday afternoon, from two o'clock until half-past five o'clock has been granted by the Benchers. We understand however that the privilege might cease speedily if not taken advantage of; of which those concerned would do well to take notice.

EXAMINATION QUESTIONS.

FIRST INTERMEDIATE.

Common Law

1. What are the three necessary ingredients in a simple contract?

2. Where several parties, not partners, enter into a common liability to pay, and one pays more than his share, what remedy has he, and why?

3. Define trespass, and give examples of it?

4. Under what circumstances will representations as to the qualities of a horse made by the owners to the buyer amount to a warranty?

5. How may a partnership be dissolved? Answer fully.

6. Compare the liability of an infant (*a*) in case of a contract entered into by him, and (*b*) a tort committed by him.

CORRESPONDENCE.

Unlicensed Conveyancers.

To the Editor of THE CANADA LAW JOURNAL.

DEAR SIR,—I have read with a great deal of interest the letters that have from time to time appeared in your Journal on the subject of "Unlicensed Conveyancers" and I am glad to see that we have a staunch and true friend in your paper.

I read the letter from "S." last month, and wish his suggestion as to a clause being inserted in the Judicature Act could be carried out, but am sorry to have to say that as long as these unlicensed men have any political influence at all, whether individually or in the aggregate, I am afraid Mr. Mowat will not introduce this clause. Men in all other lines and walks of life whether national or social are more or less "clannish" and band together to help one another and protect themselves. Dentists, auctioneers, common hucksters, hawkers, and pedlars must have a license to carry on their business: but any man, however ignorant, as long as he can write, or hire clerks to write as they often do, can set up in a country town or village and, if he will work cheap enough, may make more money than those who have worked hard and paid heavy fees in order to enter the profession. A country solicitor's practice is to a great extent built up by conveyancing: but the fact is, nearly all the conveyancing outside the cities is done by non-professional men. For instance, the Registrars at Walkerton or Goderich, or any practitioner in either Huron or Bruce, will tell you that men like Mr.—, (a magistrate in a small village, who can hardly read and write) does more conveyancing—a great deal more—than all the solicitors in the county put together. The man in question has done nothing else for years except act as a lawyer, keeps several clerks, and has made a fortune out of his business. I could mention other cases of a similar kind. These men go further; disregarding the penalties laid down in R. S. O. cap. 140, they do nearly all the non-contentious, surrogate, and probate business in the county. (Query—Why do the Judges and Registrars of these Courts allow men to draw and file papers n their offices exactly the same as an attorney or proctor would?) They do a large collecting business, sending debt letters and charging costs in the same way that a solicitor does. They give advice and take pay for it. They are allowed to practise and do practise in the Division Courts. There is one of them who acts as a regular lawyer in Lucknow and attends nearly all the Courts in his own county, and comes frequently to the Wingham Courts to practise, and the Judge *sees* him, though his dress cannot be said to be in keeping with his assumed position; but then the Division Court Act says nothing about collar or cravat.

There is one of this sort who constantly practises in Bruce, and I actually saw a regular solicitor opposed in a country Division Court in Bruce some months ago by an unlicensed man, though the solicitor called the Judge's attention to the fact, and a counsel fee under the increased jurisdiction was actually taxed to this unlicensed man—I think $10.00. This same man, who is still living in Ripley, told me he would just as soon not be certificated—that everyone around thought he was a lawyer, and he acknowledged that he made as much money as if he was licensed, if not more.

Take away from a country solicitor his conveyancing, his surrogate practice, his collecting, and a great deal of his Division Court work, and often his advising, and what, I say, have you left him? This is a conundrum I would respectfully like to submit to that unselfish body the Law Society of Upper Canada in Convocation assembled.

We are not only not protected, but we are bound down and fettered by red tape and professional rules; we are not allowed to go down and meet these fellows in their own field, on their own ground.

We are not allowed to advertise the way they do in the local papers. Take up any country paper and see the "blow" they make about *accuracy* and CHEAPNESS! We can not go out into the world and advertise on slabs and posters all over the country.

Blazoned in gold letters on the arch running over the stage in the Brussels Town Hall are several full length conveyancers' cards, one of which I copied when I was attending Court there the other day; I give it verbatim—"W. Harris, dealer in Marriage Licenses, Music and Conveyancing."

The banker above referred to has immense red cards and posters all over the country, stating that he draws all "documents and all mortgages, deeds, agreements, marriage articles &c." in short

specifying every instrument that could possibly exist, and some that I never heard of till I saw this card, "cheaper and more accurately than any one in town!"

As one gets off the cars at Teeswater station on the narrow gauge, the first object that meets the eye is an immense sign-board the size of a railway bulletin board, which enumerates the many good qualities as conveyancer of one S. Softley, said to reside in that village, and ending thus—"For cheapness and legality (*sic*) I cannot be beat."

A private banker in Wingham previously mentioned, and Cameron & Campbell, Bankers, of Lucknow, both advertise after their banking card, "A general banking and conveyancing business done!" In fact nearly all the bankers round here put it in that mild way.

There would not be so much of this conveyancing done if these men were not "commissioners in B. R. &c." (as they are proud to advertise themselves).

These men never administer affidavits for use in the Superior Courts. There are enough of lawyers all over the province and more then enough for that purpose. I wonder if the Courts know when they grant these appointments right and left that these men are simply going to use their powers in conveyancing. There is *not one* commissioner but got the appointment for the purpose of conveyancing alone: truly, the Courts might put some restriction in the way. These men would soon have to give up conveyancing if they had to come to lawyers to be sworn—their customers would soon come to us too.

One rather amusing feature about this is the fact that these appointments are all on parchment with a big red seal affixed, and the commissioners keep them generally framed in a conspicuous position, and farmers often are led from this to believe that somehow or other he must be a lawyer, and possibly a good one, to get such a "diploma" as some of these commisioners speak of it! The same applies to their appointment as notaries. By the way, the banker I have so often mentioned has got big green labels stuck up in his office with this remarkable legend: "Notary by the *special* appointment of His Honour the Lieut-Governor, &c!"

I allow that in the early history of the province there might have been a need for say one commissioner in a village if there were no solicitor there, but never was there need for seven or eight as there are in some little villages, and there is no need for any non-professional commissioners now.

These notaries say that their appointment as notary gives them special power to draw all conveyances, whilst it only reads and means *mercantile* "instruments" such as charter-parties bottomry bonds, &c. Now as far as these commissioners are concerned there is no doubt these men were all appointed simply in an emergency and for the convenience of the Courts and that they may be removed at will: it is in the power of the Superior Courts or any one of them at any time to cancel and revoke these commissions, and the sooner it is done the better for the profession. Surely if this were once well understood the Courts would immediately do it, as the Judges cannot be influenced by politics, and these country conveyancers would have no lever to bring to bear on the Courts.

Let the Courts do this—it is a very simple matter—and country conveyancing would be dealt a blow from which it never could recover. I will guarantee two things: 1st. That not one of these unprofessional commissioners in either Huron or Bruce swears one affidavit for use in the Superior Courts in a year, and so he is of no use or convenience to the Court; and 2nd. that if these commissioners were cancelled now, the conveyancing would all be in the hands of the profession in two years.

Another plan which I have heard suggested is one which ought to have been the law here ever since the incorporation of the Law Society in 1832, and which has always been the law in England—I mean the prohibiting any unlicensed man under a heavy penalty from drawing any instrument *inter vivos*—(of course wills must necessarily be excepted), or the prohibiting the drawing of all instruments under seal by any other than a lawyer duly qualified under the Statute. And here I would take the liberty to ask the Law Society again why Canadian country solicitors should not be equally protected with English solicitors.

In reference to the position put forth by "S." as to registration, I think the following plan might perhaps work better,—Make it necessary that every deed or instrument to be registered should either come out of a solicitor's office, or should show that it had been examined by a solicitor. Of course the great

and almost insurmountable difficulty is, and I suppose always will be this, that any change in the law would not affect the practice of the lawyers in the House to any appreciable extent, but surely if they seriously considered the subject they could not be so utterly careless and selfish as to totally ignore the just rights and interests of their less fortunate brethren living in smaller towns and villages.

One word more and I am done—and this is *apropos* of the Judicature Act now on the *tapis*.

Laymen and even some learned Judges like the Senior Judge of Wentworth are always talking about the Division Court being the "poor man's court," and saying they do not wish to see it become a lawyers' court. Well, would you not rather it should be a "*licensed* lawyers' court" than an "*unlicensed* lawyers' court?" Let the suitors take their own cases if they like—but why should they be allowed to have pettifoggers plead there as you see all over the country. These latter charge their customers just as much as a lawyer would, but even if they charged less, it does not follow that the allowing them to act is helping the "poor man" or making or keeping the court his court.

As long as the poor man is bound to have an agent it is not at all prejudicing him to require that that agent should be an attorney. Under the increased jurisdiction one feels the weight of this argument even more strongly than before, and my only apology for the extreme length of this letter will be this fact—that now, before the Legislature meets, is the time for country lawyers to join together and take some action in the premises.

A WINGHAM SOLICITOR.

Chattel Mortgages.

To the Editor of THE CANADA LAW JOURNAL

DEAR SIR,—In common with your correspondent "Lex" I observed in Mr. Barron's recent valuable work on Bills of Sale an Chattel mortgage a statement which in my opinion (and in that of your correspondent) is not law. namely;—that the registration of an assignment of mortgage is notice to the mortgagor., (see pages 95 and 208 of Mr. Barron's work). However, I can find no case in our reports in point, although your correspondent says that there are cases to the effect that such registration is not notice. In Mr. Leith's Real Property Statutes (page 398) the question is considered, but he does not cite any case on the subject, nor is there any case cited in the more recent work by Mr. Leith and Mr. Smith (see page 220 and 221). The cases of *Trust and Loan Company* v. *Shaw* 16 Gr. 446 and *Gilliland* v. *Wadsworth* 21 App. R. 82. come nearest to the decision of this question. In the former case the question did not actually arise, it being a suit between two mortgagees, and it was decided that the Registry Act did not apply to a person not acquiring, but parting with an interest in lands. In the latter case although the question arose, it was not necessary to decide it, but there is a *dictum* of the present Chief Justice of the Court of Appeal to the effect that resignation of an assignment of mortgage is not notice to the mortgagor, (see page 91 of the report of this case).

In my forthcoming work on "Choses in Action" in treating of this subject, I have followed the view taken by Mr. Leith, and taken exception to that expressed by Mr. Barron, but in common seemingly with Messrs Leith and Smith I have not found any decision exactly in point. Will your correspondent kindly mention the cases to which he alludes.

Yours truly

J. JAMES KEHOE.

Stratford, Jan. 4, 1881.

FLOTSAM AND JETSAM.

BRITISH COLUMBIA LAW SOCIETY.—We learn from our correspondent in the Pacific Province, that at a special meeting called after the elevation of Mr. McCreight and Mr. Robinson to the Bench, Messrs. Johnson and Hett were appointed Benchers in their place. Mr. McCreight, who had been Treasurer, is succeeded by Mr. Hett. A committee was appointed to draw up an address of congratulation to the new judges, and another committee to consider and report on the new Supreme Court rules. It was also decided to give a dinner in honour of the judges, in honour of the dignity conferred upon them.

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DIARY FOR FEBRUARY.

1. Wed....Final Examination for Attorneys.
3. Thurs..Final Examination for Call.
4. Fri.....Final Examination for Call with honours.
6. Sun.....5th Sunday after Epiphany. Hagarty, C. J., C. P., [sworn in, 1856.
7. Mon...Hilary Term begins.
10. Thurs..Queen Victoria married, 1840.
11. Fri.....R. E. Caron, Lieut.-Governor of Quebec, 1873.
13. Sun....Septuagesima Sunday.
14. Mon...Last day to move against Municipal Elections.
15. Tues...Supreme Ct. sitt. [goode, first C. J. of U. C., died 1824.
17. Thurs..Re-hearing Term in Chancery begins. William Os-
18. Fri.....Canada settled by the French, 1534.
19. Sat.....Hilary Term ends.
20. Sun.....Sexagesima Sunday.
27. Sun.....Quinquagesima Sunday. Sir John Colborne, ad-
28. Mon....Indian mutiny began, 1857. [ministrator, 1838.

TORONTO, FEBRUARY 1st, 1881.

WE publish in another place the report of a decision in the Maritime Court of Ontario by His Honor Judge McKenzie, which will be found of interest to those who occupy their business in these inland seas of ours. We shall, as soon as we find space, give our readers the benefit of an elaborate opinion by an American Judge touching upon the effect of the sale of American vessels under our Act.

THE member for Carleton in the Local Legislature has given notice of a bill to abolish precedence and preaudience at the Bar. We understand that the act will contain a clause, preventing increased Counsel fees being taxed to Queen's Counsel by reason of their holding that position. This looks as if Mr. Monk were not very hugely impressed with the sacredness of the privilege lavishly accorded of late years, of wearing silk instead of stuff.

THE Supreme Court of the United States is very far behind with its judicial work. If that court were to work steadily for two years, no new appeals being entered in the meanwhile, it could not dispose of the business now before it. But, as is well known, appeals are accumulating and increasing, so that the Court finds itself every month more and more "snowed up." The remedy suggested is to cut down the list of appealable cases, by confining to State tribunals as courts of ultimate appeal many causes of action now brought into the Federal Courts. But it is easier to see the mischief than provide a remedy.

IT may very possibly have occurred to some that the defendants in the prosecution against the Land Leaguers in Ireland are not only taking the matter very coolly, but have possibly over-stepped their legal rights in absenting themselves from Dublin during the trial. The former they certainly are doing, but not the latter. The case is thus stated by the *Law Journal*:—"The prisoner charged with felony is bound to be present during his trial, but there is no such obligation on a defendant charged with a misdemeanor, as in the case in question. The defendants in the trial at Dublin did not even 'appear' in the technical sense of the word, in person; by the practice in informations in the Queen's Bench they appeared by attorney, and one of them, we believe, has not as yet been present at all. If a verdict is returned for the Crown, the defendants must appear to receive judgment; but at present there is no obligation on them to be in Court, or even to be in Ireland. The practice is hardly compatible with the dignity of a criminal trial, and is one of the unreasonable distinctions which exist between felony and misdemeanor."

AN interesting paper might, with a little research, be prepared referring to some of the many anomalies still remaining in English jurisprudence. One very striking one in connection with criminal procedure occurs to us at present. There is a record kept of the smallest judgments recorded in a Division Court, but this is not so as to sentences pronounced against prisoners. The observation "*sus. per col.*" may or may not be inserted in the calendar opposite the name of a man condemned to death for murder; and by some investigation it might be possible to arrive at what became of some unfortunate who had been sentenced to imprisonment for life, but as to any record, or entry of judgment or other judicial registration of the sentence, it is not to be found. We are not aware that any great injustice has arisen from this peculiarity of the law, but it strikes one that the omission is somewhat singular and that a little more formality in the premises would be desirable.

EQUITABLE EXECUTION.

It is much to be desired that some author "learned in the law" should write a treatise upon the subject of Equitable Execution. We are not aware of any text-book which deals with this topic, except in the most cursory manner. In a country like this, where it is very often difficult to realize the fruits of judgment, and creditors are "beaten on the execution," it is desirable that the law for the benefit of creditors should be in a well-defined and satisfactory state, which is certainly not the case at present. While so many changes are foreshadowed in the names of things and the times of doing them, as appear in the contemplated Judicature Act, the weightier matters of substantial justice should not be overlooked. Is it right that a debtor should beneficially enjoy property which his creditor cannot touch? Should he be able to live at ease, and put at defiance every one to whom he is justly indebted? Yet substantially that is the law in this highly civilized province of Ontario.

The origin of this equitable jurisdiction in aid of the law is given by Vice-Chancellor Leach in *Kirkby* v. *Dillon*: C. P. Coop. 504. He points out that it was very common for debtors to convert their legal estates into equitable ones in order to defeat their creditors who obtained judgment. That gave rise to numerous bills for equitable execution. In many cases of the kind, he says, the legislature has given relief to creditors in courts of law by the Statute of Frauds, which enables the sheriff to levy upon lands held in trust for the debtor. But, notwithstanding this, it is obvious that there are many cases in which a debtor has a beneficial interest in land and yet no one can be said in a legal sense (*i. e.*, as understood in a court of common law) to be seized or possessed in trust for him; and also there are many cases in which no process at law can get at that estate of which some one is possessed in trust for the debtor. In such cases as these, the Vice-Chancellor says, presenting impediments which the common law courts cannot remove, bills for equitable execution must continue to be filed.

But the courts of equity have not yet given effect to these words in their obvious scope, and have introduced many limitations on their own power. Thus, so far as it regards personal estate, it has been held by the highest court in this Province that if the execution debtor is entitled to a definite share of the annual proceeds of the estate of a deceased person, yet that this valuable interest cannot be reached at law or in equity for the benefit of his execution creditors: *Gilbert* v. *Jarvis*, 16 Gr. 265. And in *Robertson* v. *Beamish*, 15 Gr. 676, the right is limited to those cases in which the bill seeks to impose on the equitable interest the liability which would attach at law on a corresponding legal interest. And this was held by our highest court to be a proper limitation in *Fisken* v. *Brooke*, 4 App. R. 8. It is noteworthy, also

that in this last case Moss, C. J. observes that the necessity of obtaining equitable execution would seem to be very much diminished by the extension of the sheriff's powers to the sale of every interest over which the execution debtor has a disposing power exercisable for his own benefit without the assent of any other person (p. 23.). But a very marked limitation has been indicated as the true construction of this clause of the statute by Proudfoot, V. C., in *Allen* v. *Edinburgh Life Assurance Company*, 29 Gr. 310: namely that the words "disposing power" must receive their ordinary meaning as estates which the party can deal with by means of the exercise of some power in that behalf without the assent of other persons. In an earlier case the Chancellor thought the statute was meant to embrace any and every interest which the execution debtor might possess for his own benefit disposable by himself: *Williams* v. *Reynolds*, 25 Gr. 49. But this point was not argued, and the Vice-Chancellor adheres to his view in a later adjudication upon the same case: *Allen* v. *Edinburgh*, 26 Gr. 192. So that the present judicial construction is rather embarrassing as to the effect and comprehensiveness of this enactment.

The unsatisfactory position of the law is also clearly brought out by the decision in *Fisken* v. *Brooke* already referred to. Real and personal estate was there left by the defendant's father in such a way that the whole formed one fund out of which the defendant and his wife were to have their support and maintenance in a manner suitable to their rank and station. But it was held that the handsome income derived from this source was not to be reached by any process or by any court for the satisfaction of the husband's creditors. This we submit is not a satisfactory state of the law, but is one which urgently demands a legislative remedy. And if it be within the bounds of possibility, let that law be so plainly expressed that the wayfaring man, unless he be withal a fool, may understand what he reads. It is surely a matter of extreme regret that the time of everybody should be wasted, and much money of the long-suffering client spent in endeavouring to find out what is meant by current legislation. What a commentary upon lucidity of legislative expression is the long line of discordant authorities upon the law relating to married women, and the law relating to mechanics' liens. It would certainly be desirable in these and similar cases to invoke the aid and experience of the judges in framing new laws or in modifying old laws on such subjects. And such emphatically should be the case in reference to the new laws relating to process and procedure impending over us; the views of the judges should be ascertained, and, as far as possible, given effect to.

THE LATE CHIEF JUSTICE MOSS.

It is always a difficult task to frame, in language adequate to the subject, a just estimate of a departed friend, especially when he has filled with distinction, positions of honour and responsibility. The language of eulogy naturally wells up from the heart; and by the indifferent reader it is interpreted with some deduction on the score of partiality more or less to be expected. And yet, when all is done, a writer has too good reason to fear that some effective strokes are wanting to complete the picture. It is a standing reproach to eulogies of the sort, whether graven in marble or imprinted on paper, that they art apt to be fulsome. Certainly, vanity or affection has often erred in this respect, wilfully sometimes, but often with a vision blurred by the mist of tears. On the other hand, truer and more vivid impressions are gained under bereavement, not clear to the inward sight before. Forgotten or heedlessly noted beauties of character are disclosed with a fullness not hitherto attained; and those faults and foibles which may have assumed undue proportions for us in life, are dwarfed in the immeasurable distance across the gulf

which separates this mortal existence from that which lies beyond the grave.

Chief Justice Moss was gifted with a personal character attractive almost to fascination. By those who knew him, and enjoyed, in any degree, the privilege of his intimate friendship—and the circle is wide and comprehensive—he will be chiefly regretted, after all, not for what he did, but for what he was. No more manly or honest heart ever beat beneath the stuff gown of the undergraduate, or the purple cape of the judge. Possessed of more than ordinary ability, successful to an unprecedented degree in all he set his hands to work upon, he had no impatience at dullness, no jealousy in rivalship, no superciliousness in high station. What he was discovered to be in the promise of youth, he remained to the last—hopeful, helpful, self-sacrificing, nobly and manfully generous. Those who met him in academic or professional intercourse did not so much admire as love him; and this warm and tender appreciation of an essentially chivalrous character acted as a talisman against all the petty passions which mar and often poison men's intercourse in the rough competition of active life. Chief Justice Moss had no enemies, simply because it was impossible to be a man and yet be an enemy to him.

It is well to linger over these features of his character because they are those which unite together, in a common bond of sympathy, friends who are otherwise apart in taste and professional pursuit. Many an Upper Canada College boy of twenty odd years ago remembers Thomas Moss; many a graduate of his Alma Mater has watched his brilliant career with something like brotherly interest; many a legislator, many a member of the profession feels the same common attraction to the departed judge, and suffers the same inward pang at his premature removal by death.

But there was more in the late Chief Justice than geniality and kindly feeling. He possessed an intellect singularly acute and receptive, a wonderful aptitude for the mastery of any subject before him, and a singularly tenacious memory touching what it was of importance to know and retain. To many, these talents serve as a substitute for hard work and constant, assiduous application. It is at once flattering to human pride and soothing to that aversion from toil natural to men, to believe that one is clever enough to dispense with the drudgery of study; but if any student or practitioner of law strives to find a crucial instance in the late Chief Justice, he will make a serious mistake. He certainly possessed a wonderful power of insight; yet, because of it, he saw clearly that without a solid foundation, acuteness of mental intuition is as likely, indeed more likely, to lead astray than to guide aright. No substantial basis of knowledge, no matter what may be its subject-matter, can be acquired as by inspiration. Labor alone conquers all things, and Chief Justice Moss was a conscientious and painstaking laborer from youth upwards.

It is easy to attribute success in life to chance; but if we do so, the facts will prove that where we do so, it is because we have taken no pains to ascertain the truth. No man ever rose to so high a position in Canada, or elsewhere, as did the subject of this obituary without having, not merely a good intellect, but a well-stored and cultured one also. The history of a life, all too short for the Province and the Dominion, contains but few stirring incidents; still it may be well to recapitulate its main data.

Chief Justice Moss was born at Cobourg, on the 20th of August 1836, and, therefore, died at the early age of forty-four. He belonged to the middle-class, and owed nothing to social or official connections so long as he lived. At an early age his father and the family removed to Toronto, and there his entire active life was almost wholly passed. He was first known to the outer world as a distinguished prizeman at Upper Canada College. There he laid the foundation for a yet more brilliant success at the University of Toronto.

Our higher academies do not always receive credit for the work they accomplish in disciplining youths for the battle of life. Mr. Moss, at all events, was throughout life a visible evidence of the admirable training of old Upper Canada. It had a reputation for severity in those days, and more than one of the masters had a reputation for not spoiling the child by sparing the rod. At any rate, the future judge acquired in the halls of the college a sound basis of learning, and, what is better, systematic habits of studious industry. When he left the institution, bearing off with him the Governor-General's prize, he was the most popular, as well as the best mentally equipped pupil who ever left the highest form. His career whilst there is the best possible apology for the institution which can be offered; since not only did he, in after years, vindicate the character of its tuition, but proved, to demonstration, the value of its dicipline in the formation of a vigorous, manly, and thoroughly practical habit of mind.

In 1854, Mr. Moss entered the University of Toronto, receiving a first-class scholarship in the two departments of classics and mathematics. Those who were his contemporaries there will be the first to acknowledge the abilities he possessed, and to do justice to the thorough grounding he possessed in his special departments. There was not so much competition in those days of Alma Mater, as now; still Mr. Moss had no child's play of it even then, and, fortunately for himself, was not by any means permitted to walk the course. That he triumphed in the end and won the honorable race upon which he had entered, was a credit at once to his training, his abilities, and his persevering industry. Of his career at the University we have gathered some interesting reminiscences, which however might not prove of interest to the reader. It must suffice to remark that throughout his course of four years he was not so much a rival as a friend to those who now lament his premature death, and cherish his memory as one of the most sacred and precious possessions of their youth. It was the season of hope and aspiration then, and those who admired the vigorous form of their friend in those bygone years, welcomed the cheery smile, and grasped the warm hand of their fellow-student with more than a merely academic civility, indulged in prognostications of a bright future for him and perhaps for themselves, fulfilled in his case, but nipped, alas! in the hour of fruition. In 1858, Mr. Moss graduated with unprecedented distinction, receiving no less than three gold medals, awarded in the departments of classics, mathematics and modern languages respectively. It may be said that in at least two of these he was practically unopposed. But that in no wise detracts from the conspicuous merit of the achievement. As a matter of fact, the absence of competition should, in the natural order of things, have made Mr. Moss less diligent. Examiners, however, have ways of their own which do not coincide with the ways of the perfunctory student; and when an undergaduate had enjoyed his own way freely for a year or two, they very properly put him upon his mettle. As Prof. Cherriman used to say in those days, with truly mathematical brevity, at Commencement, "Here is Mr. ——, who has won honours in the department over which I preside, and all I need say is, that if he had failed to deserve them, he would not have obtained them." The results did not depend, in fact, merely upon a majority of marks, since under the standard, no man, even if he stood alone, could secure a first-class, without obtaining the necessary proportion.

By the death of Chief Justice Moss, Alma Mater has lost her most ardent and affectionate son. In the capacity of Vice-Chancellor, and member of the Senate, he was always foremost in suggesting and promoting schemes for the advancement of the University, and the extension of its sphere of usefulness. It now appears that he had it in contemplation to deliver lectures in the college on constitutional law and

jurisprudence — a branch of instruction strangely wanting in our Provincial scheme of liberal culture. At the first meeting of Convocation, he was unanimously elected, by his fellow-graduates, to the post of chairman, and he died whilst occupying both offices—one in the gift of the Senate, the other voluntarily offered by his brethren of the University. It is gratifying to hear that the Senate has determined to establish a permanent memorial of the Chief Justice in the form of a scholarship; still more gratifying to record that his sons, so early bereft of their distinguished father, are to be adopted as foster-children of the University of which he was so conspicuous an ornament.

Mr. Moss entered upon the study of the law in the office of Messrs. Crooks & Cameron almost immediately after his graduation; and, on a dissolution of their partnership remained with Mr. Hector Cameron, whose partner he became in 1861, on his call and admission. Thereafter he entered into partnership with the Hon. James Patton and Mr. (now Judge) Osler, and subsequently with the late Chief Justice Harrison, the firm being known as Harrison, Osler & Moss. The future Chief Justice's abilities as an equity barrister were recognized by his appointment in 1871 as Equity Lecturer for the Law Society; in 1872 he was made a Q. C. by Sir John Macdonald, and during the same year declined the offer of a Vice-Chancellorship. Mr. Moss had the advantage of being thoroughly grounded in Chancery procedure; but he was also attracted to the study of common law—a necessary condition of success in equity practice. Unconsciously, perhaps, he was preparing himself for the loftier position which awaited him.

Meanwhile, political life, for a brief period, engaged him. What he might have accomplished in Parliament had he surrendered himself entirely to public affairs, it would be hazardous to conjecture; certainly he left the arena with some reluctance at the last. Mr. Moss was elected to the Commons for West Toronto in 1873, and re-elected in 1874. Shortly after the latter victory he was appointed a Judge of the Court of Appeal, and bade adieu for ever to the hazardous vicissitudes of parliamentary life. On the death of Chief Justice Draper he became President of the Court, and upon the demise of Chief Justice Harrison, became Chief Justice of Ontario.

In casting a rapid retrospect over the Chief Justice's career upon the bench, the first feature which strikes one is the indefatigable industry and brilliant versatility of his Lordship. Few British judges can boast, within the narrow limit of six years, a range of judicial experience so varied in character, or of a discharge of public duty more thoroughly painstaking and conscientious. Those who knew him merely as a friend of courteous and affable manner will perhaps cherish the notion that care and business sat lightly upon him. Nothing certainly could be wider from the truth. In this respect he bore a notable resemblance to the lamented Lord Chief Justice of England. His grace, ease of manner and geniality in social intercourse, only veiled an immense capacity for solemn and earnest work. Wherever duty called him, and it was sometimes unconscionable in its demands upon his strength, he was found ready at the allotted post; and whatever he essayed to do, he did it with his might. At trials of election petitions, in criminal *causes célèbres*, at Nisi Prius, in Chambers, or in Banco, he never shirked responsibility or marred his work by slovenly execution.. We have referred to his powers of mental insight into principles; on the bench he found them of essential service. The Chief Justice at once struck the key-note of the case before him; yet he did not improvise law for the occasion. Having got at the heart of the mystery, he at once fortified himself by authorities which he examined and appraised in the most delicately adjusted intellectual balance. No one could detect more clearly where a pre-

cedent failed to be relevant, and wherein it was distinctly in point; nor did he ever rest until he had satisfied himself that the principles he enunciated rested upon an irrefragable basis. In marshalling facts, conflicting and involved, he has hardly been excelled on the Canadian bench; and in unravelling skillfully wrought webs of fraud he was equally successful. His judgments, as recorded in the reports, are always marvels of clearness; indeed they are so generally convincing from that lucidity which attracts non-professionals who mistake deep intuition and sound knowledge of law for what it is the fashion to term "common-sense" decisions—judgments readily evolved from the inner consciousness. Chief Justice Moss never yielded to the temptation to indolence, or for a moment substituted, even in thought, his inner light for the *lex scripta* of the statutes and the books.

Some of the principal cases in which the learned Chief Justice delivered judgment may be noted for reference. In *Fisken* v. *Brooke*, 4 App. R. 8, will be found an admirable exposition of the law relating to equitable execution. It was a case of joint ownership, and Moss, C. J., urged that to permit the execution creditor, in effect to administer the estate, would be contrary to any principle of justice or equity, where the defendant was merely a beneficiary under the will, and owned no estate in the land. In *Yeomans* v. *Wellington*, 4 App. R. 301, the reciprocal rights of municipalities and property-owners are defined, and the decision affirmed that if a highway be constructed so as to injure property, the owner is entitled to compensation. That judgment is chiefly notable for its exhaustive review of all the precedents in point, both English and American. *Rice* v. *Bryant*, 4 App. R. 542, discloses a wonderful power in analyzing and co-ordinating facts. It also illustrates the keen penetration which the Chief Justice possessed in diving down into the heart of concealed fraud. In *Fitzgerald* v. *G. T. R. Co.* 4 App. R. 609, he delivered a judgment of great importance to the mercantile community and to railway corporations. The case was one in which the Company's agent had agreed to send petroleum by covered cars; he neglected to do so, and the Company pleaded that the words "at the owners' risk" covered them from responsibility. "The correct rule," said the Chief Justice, "seems to be to pay regard to the degree of diligence which the situation assumed by a person demands, rather than to his carelessness. The words 'at the owners' risk' do not free the carrier from all liability for negligence." The verdict of the jury was therefore left undisturbed. A railway case of a different kind may be noted in *Erb et al.* v. *G. W. R. Co.*, where an agent had given a fraudulent bill of lading which had been negotiated. The judgment of the Chief Justice is remarkable for its ample discussion of conflicting views—"opposite and irreconcilable" as he proved them to be. He had the candour to admit he had not after all succeeded in banishing doubts from his mind. More than usual pains were bestowed upon this judgment, since the view adopted by the Chief Justice and Mr. Justice Burton was at variance with opinions given by brother judges of age and experience. *Re Lincoln* Election, 2 App. R. 324, decided a question relating to defective description of a voter's qualification, and was decided in favor of the elector. In *Inglis* v. *Beatty*, 2 App. 324, he delivered a most exhaustive judgment extending over forty pages. The case turned upon the liability of trustees, and especially to the question whether compound interest should be charged to a trustee under the circumstances. In *Wiley* v. *Smith*, 1 App. R. 191, another case in mercantile law arose on the important question of stoppage *in transitu*. Here the Chief Justice held, after a thorough sifting of the authorities, that the *transitus* had come to an end. The case of *Stratford and Huron Railway Co.* v. *Perth*, 38 U. C. R. 112, may be also noted as governing the matter of bonuses granted by

municipalities. One sentence from the judgment here may be cited as an evidence that the deceased judge was not disposed to adopt merely "common sense" views: "There is no sound reason for leaving discretion, in such cases, to be exercised on arbitrary principles, or according to the ideas of natural justice of the particular judge or court." We have referred to these judgments, commending them to the special notice of the profession, because they abundantly illustrate our previous remarks upon the Chief Justice's peculiar merits as a judge. To read them with care and attention is to form a high estimate of the judicial qualities of our departed friend. The touching tributes paid to his memory by Vice-Chancellor Blake and by Mr. Justice Burton on behalf of the bench, and by Mr. Robinson, Q. C., on behalf of the bar, are the surest evidence that can be adduced of the sterling qualities of the Chief Justice.

What he might have been, had his life been spared to his family and to the Province, who shall say? With abilities so striking, with a conscientious industry so persistent with a fervent zeal in the discharge of judicial duty so ardent, what might he not have done? It was not too much to hope that his organizing hand would, at no distant day, have been at work upon the Supreme Court, for the Chief Justiceship of which, not only his talents but his temperament and breadth of view would have eminently fitted him. At all events his premature death is a serious loss to this Province. No judge could more ably and sympathizingly have smoothed the way for the easy and satisfactory working of the new Judicature Act than he. He was young in years, comprehensive as to his legal opinions, and generously tender to old prejudices. Unhappily he has been removed in the flower of his age, with success attained early and snatched from his grasp only too soon for his countrymen—for Canada which he loved so well, and was so proud of boasting as his native land. We have all suffered a bitter bereavement; and although our grief cannot be so poignant as that of those who were so near and dear to him, it is with no formal or ostentatious show of sympathy that we condole with the widow and orphans left alone in the world—yet not alone, for, out through the gloom they may see sorrowful helpers who, though they cannot heal, may soothe and bind up the cruel wound inflicted by the hand of death.

LAW SOCIETY.

Proceedings of Convocation on 28th Dec., 1880, published by authority.

Present—Messrs. Irving, Smith, Hoskin, Martin, Osler, Crickmore, Maclennan, McCarthy, Read, Kerr, Mackelcan, McMichael.

Mr. Maclennan was appointed chairman in the absence of the Treasurer. The minutes of last meeting were read and approved.

The report of the Discipline Committee, on the petition of William Lamour recommending further enquiry, was received, read, and adopted.

The report of the Legal Education Committee, recommending that the examinations for Call and Call with Honours be respectively held on the Thursday and Friday before Term, at 9 a. m., and suggesting a design for the medals proposed to be presented to honor men at the said examination, was received, read, and adopted.

The report of the Committee on Reporting was received and read as follows:

The Committee on Reporting beg leave to report as follows:

1. A proposal has been received from Mr. Carswell for the printing of the reports for Convocation; your Committee does not recommend that the proposal of Mr. Carswell be entertained.

2. Your Committee recommend that 1350 copies of Mr. Hodgins' forthcoming volume of election cases, be ordered at a rate not ex-

ceeding the average cost of the regular reports of the Society.

Signed, JAS. MACLENNAN,
Chairman.

The report was ordered to be considered forthwith.

The first clause was adopted.

Mr. Read, seconded by Mr. Mackelcan, moved,

That that part of the report of the Committee on Reporting, relating to the publication of election cases, be not now adopted, but that the consideration thereof be adjourned until next term.

Amendment lost.

Mr. McCarthy moved,

That the report be referred back to the Committee on Reporting, with an instruction that the Committee be empowered, if, on an examination of Mr. Hodgins' proposed reports of election cases they deem it expedient, to agree with Mr. Hodgins for procuring 1350 copies thereof for distribution at a cost not exceeding the sum of $1 per volume, in addition to the average cost now paid by the Society for printing the ordinary reports.

Mr. McCarthy's amendment was carried.

Mr. Hoskin moved the adoption of the following rule relating to discipline:—

For the purpose of upholding the honour of the Bar and maintaining discipline amongst Barristers, Solicitors, Attorneys, Students, and Articled Clerks, Convocation shall have the power, in pursuance of sections 38 and 41 of "An Act respecting the Law Society of Upper Canada," in any case where a Barrister, Solicitor, Attorney, Student-at-law, (a member of this Society,) or an Articled Clerk, has been guilty of professional or other misconduct, to order that such Barrister, Solicitor, Attorney, Student, or Articled Clerk, shall be deprived of or suspended from the exercise of all and singular the rights, powers, and privileges belonging to him in this Society as a member thereof, or as such Articled Clerk; and Convocation shall have the power to order that the name of any such Barrister, Solicitor, Attorney, Student, or Articled Clerk, shall be erased from the books of this Society, and notice of such deprivation or suspension shall at once be given by the Secretary to the Superior Courts of Law and Equity, and to such other Courts as Convocation may order.

Which was read a first time.

Ordered, that the rule be printed and distributed to members of Convocation and to the visitors before next term.

Mr. Read presented the Report on the Consolidation of the Rules of the Society which was read a first time.

Second reading ordered for first Tuesday of next Term.

Mr. Read presented the Report of the special committee on the new building, which was read as follows:

To the Benchers of the Law Society in Convocation Assembled:

The Building Committee beg leave to report.

That on the 23rd instant the Committee met and opened the tenders for the new building submitted to them by Mr. Storm the architect.

That the lowest tenders were as follows:

1. For the whole work, Lionel Yorke, $36,795.

2. For the following portions of the work:

1.	Excavator, mason, bricklayer and stone cutter, Lionel Yorke....	$17 550
2.	Carpenter and joiner, E. Stephenson & Co.....	11 540
3.	Gravel roof, D. Forbes.....	117
4.	Slater, L. A. Wismer.....	249
5.	Galvanized iron, Wheeler & Bain.....	375
6.	Plasterer, C. R. Roundle.....	364
7.	Plumber, gas and steam fitter, Bennet & Wright.....	2 750
8.	Smith and iron monger, W. Hamilton, jr.....	1 100
9.	Painting and glazing, Alex. Hamilton.....	2 573
		$36 618

And by another mode.

L. Yorke, excavator, mason, bricklayer and stone cutter.....	$17 550
E. Stephenson & Co.,—	
Carpenters and joiners, Gravel roof, Slater, Galvanized iron, Plasterer.....	12 605
Bennet & Wright.—	
Plumber, gas and steam fitter....	2 750
W. Hamilton, jr.-	
Smith and iron monger.....	1 100
Alex. Hamilton.—	
Painter and glazier.....	2 573
	$36 578

The committee submit the foregoing to Convocation for their approval, having been advised by the architect that the tenderers are all capable mechanics.

The committee had before them a letter from the Secretary of the Department of Public Works to the Treasurer containing a copy of the order-in-Council approving of the erection of the building by the Society, provided it is erected in substantial conformity with the details contained in the memorandum of Mr. Storm, and the plans in that behalf submitted to the Commissioner.

The committee with this Report submit this communication to Convocation.

All which is respectfully submitted.

D. B. READ,
Chairman.

Dec. 23, 1880.

Mr. Irving moved that the consideration of the above report be deferred, until a special meeting of Convocationto be held on Saturday Jan. 8th, and that a Call of the Bench be made for that day, and that notice of such meeting together with a printed copy of the Report be sent to each Bencher.—*Lost.*

The report was adopted.

Mr. Kerr moved, seconded by Mr. Read, that it be referred to the same special committee who are hereby authorized to accept such of the tenders referred to in the adopted report, as may appear to them to be most advantageous, to enter into contracts and proceed with and supervise the execution of the work in accordance with the plans and specifications, the committee to require a drawback of 15 per cent. of the contract price and such collateral security by bond or otherwise as they may deem expedient, to the amount of 35 per cent. of the respective contracts.—Carried.

Mr. Creelman's letter relative to larcenies committed in the Hall, was laid on the table.

A letter from Mr. Douglas Armour, relative to a new publication called the *Canadian Law Times* was read and referred to the committee on Journals, with power to act.

A letter from Mr. Barrett, relative to certificate fees, was referred to Finance Committee, with power to act.

A letter from the Treasurer to the President of the Osgoode Legal and Literary Society, relative to prizes to be given at examinations to be held in connection with the course of lectures established by the Society and the reply thereto were read.

Mr. McCarthy moved, seconded by Mr. Read, that the resolutions of last Michaelmas Term, respecting the bestowal of prizes to the members of the Osgoode Legal and Literary Society be amended as follows, that is to say, that prizes be awarded to two classes, namely members of the said Society, who are over three years standing on the books of the Law Society, either as students or articled clerks, and to those who are on the books under three years and that the prizes be as follows, namely:—

IN EACH CLASS.

First.....	$25
Second.....	15
Third.....	10

to be given in books.—Carried.

A letter from Langley & Co. relative to their account was referred to the Finance Committee.

Ordered, that Mr. B. B. Osler's name be substituted for Mr. Miller's name on the Finance and County Library Committees.

The Special Committee on prizes to County Legal and Literary Societies was re-appointed, and Mr. Osler's name added thereto.

Mr. Irving moved, pursuant to notice, the rescission of the resolution relating to the portrait of Chief Justice Osgoode.—Lost.

Convocation adjourned.

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

EXCHEQUER COURT OF CANADA.

Fournier, J.] [January 12.

DOUTRE, *Suppliant*, AND THE QUEEN, *Defendant.*

Treaty of Washington—Employment and remuneration of Canadian Counsel—Right of Counsel to recover by Petition of Right—35 Vic., c. 25.

Under article 25 of the Treaty of Washington it is provided "that each of the high contracting parties shall pay its own commissioner and agent or counsel, all other expenses shall be defrayed by the two Governments in equal moieties."

By 35 Vic., c. 25, D., the fisheries articles of the treaty of Washington were made part of the law of Canada, and under the authority of that treaty and that statute the Government of Canada engaged and retained the services of the suppliant, a Queen's Counsel, residing in the city of Montreal, as one of the Canadian counsel before the Commission sitting at Halifax. There was evidence showing that the agreement entered into between the Minister of Marine and Fisheries and the suppliant at Ottawa, was to the following effect:—That the suppliant was to receive $1000 on account of his expenses and his services per month whilst the Commission was sitting at Halifax, and that a further sum, to be settled after the award of the Commissioners, would be paid.. The suppliant removed with his family from Montreal to Halifax, and was exclusively engaged in connection with this matter for two hundred and forty days. The Government paid suppliant $8,000 and by his petition the suppliant claimed that the amount received only paid his expenses, and that he was entitled to a further sum of $10,000 for the value of his services. The amount involved before the Commission was $12,000,000, and the amount awarded in favor of Canada was $5,500,000.

Held: 1. That this agreement constituted a valid contract, and that the suppliant was entitled to recover, by petition of right, the amount due him under said agreement.

2. That the agreement entered into having been made at the city of Ottawa, the rules of evidence in force in the Province of Ontario were applicable, and the suppliant's evidence on his own behalf was, therefore, admissible.

3. That as the evidence adduced proved that the remuneration received by the suppliant, when engaged as counsel in important cases, was $50 per diem, with an additional sum of $20 per day for expenses, when his services were required outside of his own province, the Court would grant him $8,000 out of the $10,000 claimed by his petition, being at the rate of $50 per diem, and $20 for expenses for the 240 days he was employed before the Commission.

Haliburton, Q. C., and *Ferguson*, for suppliant.

Lash, Q. C., and *Hogg*, for defendant.

COMMON PLEAS.

VACATION COURT—JAN. 14,

BUCKELL *et al.* v. MCGUIRE *et al.*

Partnership—Dissolution of—Payments by continuing partner—Appropriation—Giving of time—Discharge.

When a partnership has been dissolved, and one of the partners continues to deal with a creditor of the firm, and in such dealing the partnership and separate accounts are blended and mixed together, the payments made by the continuing partner, though without any express appropriation, must be applied to the partnership indebtedness.

In this case also the retiring partner was held to be discharged by the giving of time to the continuing partner, and leave was granted to add a plea setting up this defence, if deemed necessary.

Bruce (of Hamilton) for the plaintiffs.

Maclennan, Q. C., for the defendants.

CHANCERY.

Spragge, C.] [Jan. 12.

GOODERHAM v. THE TORONTO AND NIPISSING R. COMPANY. FOX v. THE SAME COMPANY.

Receiver—Passing accounts—Unauthorized payments — Allowance of items paid without authority—Costs.

The Receiver appointed to receive the proceeds of a railway company and apply the same in carrying on the business of the company, paid $55.97 to the owner of land over which the line ran for the right of way over his lands, he having threatened to obstruct the passage of the company's trains unless paid; on passing his accounts the Master refused to allow the payment in favor of the Receiver, which ruling of the Master was affirmed on appeal, as such payment did not properly come under the head of "outgoings" for the road, and which alone the Receiver was authorized to pay; but the court (SPRAGGE, C.) gave the Receiver liberty to take out an order now for the allowance of this disbursement on payment of the costs of the appeal—but refused to make such an order in respect of fees paid to the Solicitor of the company for the examination of titles, as there was not any evidence to show that the payment was such as would have been sanctioned by the court if applied to in the first instance for permission to pay the same.

Spragge, C.] [Jan. 12.

HALLERAN v. MOAN.

Statute of frauds—Promise not be performed within a year—Executed consideration.

The Court will enforce a verbal agreement, although it is to do an act which is not to be performed within a year from the time making the agreement where the consideration therefor has been executed.

Proudfoot, V. C.] [Jan. 19.

TYRWHITT v. DEWSON.

Will—Construction of—Legacy on termination of life estate.

By his will and codicil a testator devised to his son J. on the death of his mother, certain land in consideration for which he was to pay the sum of £150 to the executors in four years. In the event of his dying without heirs the land was to be sold and the amount received therefor over and above £150 "to be equally divided amongst my surviving children."

Held, (1) that J. took a fee tail in remainder after an implied life estate in favor of the mother as the "dying, without heirs" must be taken to mean heirs of the body, not heirs general, he having brothers and sisters still living:

J. died during the lifetime of his mother.

Held, (2) that the period of division should be the death of the tenant for life, and the survivors at the time of such death were to take the whole amount realized by the sale of the lands upon which, however, the £150 was to form a charge.

Proudfoot, V. C.] [Jan. 19.

WOOD v. HURL.

Construction of Statutes—Grouping clauses in Acts—Head lines—R. S. O. cap. 49, s.s. 10 & 11.

Held, following *Eastern Counties &c., R. Co.* v. *Marriage*, 9 H. L. Cases 32: *Long* v. *Kerr*, L. R. 3 App. Cas. 529, and *Van Norman* v. *Grant*, 27 Gr. 498, that both sections 10 and 11 R. S. O. cap. 49, are to be governed by the head-line immediately preceding section 10; and so where the interest sought to be reached by the creditor has not been concealed by a fraudulent conveyance, the judge has not any authority to give summary relief thereunder; and an order made by the referee for the sale in a summary manner of the interest of two of four tenants in common was reversed.

Crown v. *Chamberlain*, 27 Gr. 551 followed: *Donovan* v. *Bacon* 16 Gr. 472 n. doubted.

Proudfoot, V. C.] [Jan. 19.

GOUGH V. PARK.

Taxation of costs—Solicitor and client's costs Special attendance before Master—G.O. 608.

A decree was drawn up by consent, whereby the plaintiff agreed to pay the defendant's costs to be taxed between solicitor and client. The bill was filed at Toronto and the defendant's solicitor being conversant with the case, was requested by his client to attend at Toronto and examine the plaintiff. The solicitor occupied two days in going and returning, and attending before the examiner, and expended $15.50. The defendant paid him $6. 00 for these services. The Master allowed $6. 00 for a special attendance of three hours: Held on appeal (1) that the plaintiff would be bound to pay what the solicitor could recover from his client, (2) that though under the authority of *Re Geddes and Wilson* 2 Ch. Cham. R. 447, the solicitor could not contract for a higher recompense than the tariff specifies, yet, as it was reasonable that the solicitor should have personally attended to the examination, and as the amount was not excessive for the time occupied, it was not probable that the client could have reduced it on taxation; and being taxable against the client, it should be allowed against the plaintiff.

Proudfoot, V. C.] [Jan. 19.

RE DUNHAM.

Quieting titles Act—Assent to devise implied till disclaimer.

A. went into possession of land upon the invitation of P. who promised to give him a deed but subsequently refused to do so. A. thereupon determined to remain upon, and succeeded in making a living from the land. P. died several years afterwards, having devised the land to A. and his wife for their joint lives with remainder to J.J.C.P., one of the contestants. A. occupied the land for about forty years, and executed a conveyance thereof in fee to the petitioners.

Held, on appeal from the Referee of Titles, allowing the claim of the contestants, that A. by his entry had become tenant at sufferance to P. and that as A. was aware of the devise to himself, and never did any act showing a determination not to take the estate so given to him, the estate for life had vested in him.

Some thirty years after A's entry he granted part of the land to one B. and J.J.C.P. joined in the conveyance:

Held, a sufficient admission of the title of J. J. C. P. as a remainder-man, and so an admission that the will was operative on the land; J. J. C. P., having no claim to the land except under the will.

CHANCERY CHAMBERS.

Spragge C.] [November, 1880.

RE BENDER.

Will—Specific disposition of property—Improvements.

A will contained specific directions as to the disposition of real property until the coming of age of infant children and no provisions for making improvements.

The Court, on the application of the executrix, the tenant for life, allowed certain improvements to be made, which it appeared would be beneficial to the estate.

Murray for petitioner.

Spragge C.] [January 17.

RE HENDERSON & SPENCER.

Vendor and purchaser—Title by foreclosure—Presumption—Rev. Stat. Ont. cap. 109, sec. 3.

A final order of foreclosure will be presumed to have been regularly obtained till the contrary is shewn—It is not necessary between vendor and purchaser to show that a defendant was alive when a final order of foreclosure was granted—the service of the bill being personal, and made within seven years of the making of the order.

Small, for petitioner (vendor).
Hamilton, contra (purchaser).

REPORTS.

MARITIME COURT OF ONTARIO.

(Reported by John Bruce, Esq., Registrar to the Court.)

IN RE TUG "ROBB."

Merchant Shipping Act, 1854, Sec. 189—Seaman—Wages or damages.

Held, 1. That the Merchant Shipping Act of 1854 is not to be read in connection with the Vice Admiralty Act of 1863, which gives jurisdiction to the Maritime Court of Ontario, and that therefore this Court has jurisdiction over any claim for wages.

2. That under the facts set out in the petition, the petitioner was a seaman within the meaning of the Acts, and the claim was for wages and not for damages.

[Toronto, Oct. 6, 1880.

The facts of the case appear in the petition filed by Joseph Dunbar, who made a claim for seaman's wages. This petition was as follows:—

1. "The said tug or vessel, called the tug *Robb*, is a vessel of — tons registered tonnage, and belongs to the port of Toronto, and is now lying in the said port of Toronto, etc., and was during the times hereinafter mentioned engaged in trade and commerce upon, or navigating the rivers, lakes, canals or inland waters, the whole or part of which are in the Province of Ontario.

2. "That on the 9th September, 1880, the master or mate of the said tug *Robb* hired your petitioner, Joseph Dunbar, to work on board the said tug *Robb*, as a deck hand, for the period of one month, including the afternoon of the said 9th September, 1880, and your petitioner went on board the said vessel and commenced working thereon about 4 o'clock in the afternoon of the 9th September, and worked thereon until your petitioner was wrongfully discharged on the morning of the 10th September aforesaid.

3. "That under and by virtue of the said contract of hiring, your petitioner, Joseph Dunbar, was to have his board and lodging in the said vessel over and above the said sum of 15 dollars per month, and your petitioner was on board the said tug under the said contract of hiring, and remained thereon until he was wrongfully discharged on the morning of the 10th September aforesaid.

4. "That your petitioner, Joseph Dunbar, has received no sum or sums of money on account of said month's wages, and your petitioner was always ready and willing to perform his duties as deck hand aforesaid.

5. "Your petitioner submits that by reason of the wrongful dismissal aforesaid, he is entitled to the sum of fifteen dollars, the amount of his wages under said contract of hiring.

6. "The said tug is now lying as aforesaid at the port of Toronto aforesaid, and will, unless detained by the warrant of this honourable Court, immediately leave the said port and sail elsewhere; and your petitioner fears that, in such case, his said claim will be lost.

"Your petitioner therefore prays," &c., &c.

William Hall, the owner of the tug *Robb*, intervened and demurred to the plaintiff's said petition as follows:

"William Hall, &c., who is the owner of the above-mentioned tug *Robb*, the subject matter of this suit, by A. R. C., his Proctor, hereby intervenes in the cause, and not admitting any of the matters and things in the plaintiff's petition contained to be true in such manner and form as the same are therein set forth and alleged, demurs in law to the said petition, and for causes of demurrer shews:

1. "That it does not appear from the said petition of the plaintiff that the plaintiff was at the time of the alleged hiring a seaman within the meaning of the statutes in that behalf.

2. "That even if the plaintiff were at the time of the alleged hiring a seaman, his claim as set forth in the said petition is not one within the jurisdiction of this honourable Court, being a claim for damages on account of an alleged breach of contract, and not for wages which had accrued due.

3. "That the plaintiff's claim, as set forth in the said petition, is not one within the jurisdiction of this Court, it appearing from the said petition that the said claim is for a less sum than 50 pounds, and it not being alleged that the said William Hall, the owner of the said tug *Robb*, is, or was at the time of the filing of the said petition, adjudged bankrupt or declared insolvent, or that the said tug was at the time of the filing of the said petition under arrest, or was about to be sold by the authority of this honourable

Court, or that the claim of the plaintiff had been referred to be adjudged by this honourable Court, by any justices acting under the authority of the Merchant Shipping Act of 1854, or that neither the owner of the said tug *Robb*, nor the master thereof, was or resided within 20 miles of the place where the plaintiff alleges that he was discharged.

"Wherefore, and for divers other good causes of demurrer appearing in the said petition, the defendant demurs thereto, and prays judgment whether he ought to be compelled to make further or other answer to the said petition, and he prays to be hence dismissed with his costs."

McCarthy, Q. C., appeared to support the demurrer.

The Court has no jurisdiction at all in a matter of the amount stated in the petition. The Maritime Jurisdiction Act, 1877, creates the Court, the first section of which defines the jurisdiction in the following words: "Save as by this Act excepted, all persons shall after this Act comes in force in the Province of Ontario, have the like rights and remedies in all matters (including cases of contract and trust, and proceedings *in rem* and *in personam* arising out of or connected with navigation, shipping, trade or commerce on any *river*, *lake*, *canal or inland* water, of which the whole or part is in the Province of Ontario), as such person would have in any existing British Vice-Admiralty Court, if the process of such Court extended to the said Province." The jurisdiction of a Vice-Admiralty Court is defined in the Merchant Shipping Act of 1854, sec. 189, which was to the effect following: "No suit or proceeding for the recovery of wages under the sum of £50 shall be instituted by or on behalf of any seaman or apprentice in any Court of Admiralty or Vice-Admiralty, or in the Court of Sessions in Scotland, or in any Superior Court of Record in Her Majesty's Dominion, unless the owner of the ship is adjudged bankrupt or declared insolvent, or unless the ship is under arrest or is sold by the authority of such Court, as aforesaid, or unless any justices acting under the authority of this Act refer the case to be adjudged by such Court, or unless neither the owner nor the master is or resides within 20 miles of the place where the seaman or apprentice is discharged or put ashore." Section 188 of the Merchant Shipping Act of 1854, gives seamen the power to go before two justices of the peace to recover small amounts, and it is only when the amount exceeds £50 that there is a necessity for proceedings *in rem*. The section 188 is in force here now, and is the proper authority under which proceedings should be taken to recover small amounts. The Imperial Act, 26-27 Vict., cap. 24 (The Vice-Admiralty Courts Act, 1863) is to be read in connection with the existing laws, and in connection with section 189 of the Merchant Shipping Act of 1854. The repealing clauses in the Vice-Admiralty Courts Act, 1863, make no reference to section 189. See *The Margaretta Stevenson*, 2 Stuart's Reports 192. This claim is not a claim by a seaman for wages within the meaning of the Acts, but is in the nature of damages. The petitioner signed no articles, and cannot invoke the jurisdiction of this Court: see *The City of St. Petersburgh*, 2 Stuart, 343; *Tecumseth*, 3 W. Rob. 109; *Mona*, 1 W. Rob. 137; *Riby Grove*, 2 W. Rob. 61; *City of London*, 1 W. Rob. 88; *Deoressia*, 3 W. Rob. 33.

Hall for the petitioner. In 1861 the Merchant Shipping Act was amended so as to give the Court jurisdiction in all cases, only reserving the question of costs. See 24 Vict. cap. 24, sec. 10. The Vice-Admiralty Courts Act, 1863, must govern the contention. The preamble of the Act shows that the jurisdiction of the Vice-Admiralty Courts is to be extended and their practice amended. By section 10 the Act declares that the matters in respect of which the Vice-Admiralty Courts shall have jurisdiction are as follows, amongst others:—Claims for seamen's wages, &c., without any restriction or limitation as to amount whatever. The Imperial Act, 26-27 Vict. cap. 24, and the Vice-Admiralty Courts Act, 1863, were passed for the purpose of extending the jurisdiction of the Vice-Admiralty Courts, and it must be considered that this Court has jurisdiction in regard to seamen's wages. As to the case of *The Margaretta*, The Vice-Admiralty Act, 1863, is not mentioned or referred to in the judgment of the Court or otherwise. The point made that the petitioner is not a seaman within the Acts is not tenable: see Seamen's Agreement Act of 1875. The master of the vessel having violated the law, cannot defend himself against the wages of the petitioner. On the question of wages being claimed when the seaman is dismissed, see *The Great Eastern*, 1 Ad. R.;

The Blessing, L. R. Prob. Div. 35; *The City of London*, 1 W. Rob. 88; Roscoe's Practice 40.

McCarthy, Q. C., replied.

MACKENZIE, CO. J. (JUDGE OF MARITIME COURT). The Merchant Shipping Act of 1854 came into operation on the 1st of May, 1855. The Vice-Admiralty Courts Act, 1863, passed on 8th June of that year. The Dominion Act, 40 Vict. cap. 21—the Maritime Jurisdiction Act, 1877—under which this Court was established and organized, was passed on 28th April, 1877. The Court was organized under and by virtue of a proclamation of the Governor in Council on the eighteenth day of February, 1878. It is proper to bear in mind those dates in determining the question of jurisdiction as affected by the Merchant Shipping Act of 1854.

The first point presented on behalf of the defendant is that this Court cannot entertain a claim for wages under £50, under section 189 of the Merchant Shipping Act of 1854. The words of the section are, "No suit or proceeding for the recovery of wages under £50 shall be instituted by or on behalf of any seaman or apprentice in any Court of Admiralty or Vice-Admiralty," and section 188 points out how seamen may proceed to recover in a summary way before two Justices of the Peace for wages under £50.

It is admitted that the Merchant Shipping Act extends to this Province, and is in force here. On reading sections 188 and 189, pure and simple, without looking elsewhere, and to subsequent legislation, only one conclusion could be arrived at, namely, that this Court should rule that the petitioner had no lawful right to institute the present proceeding in the Maritime Court of Ontario. But subsequently to the Merchant Shipping Act, that is in 1863, the Imperial Parliament passed "The Vice-Admiralty Courts Act, 1863," intituled "An Act for facilitating the appointment of Vice-Admirals, and of officers in Vice-Admiralty Courts in Her Majesty's possessions abroad, and to confirm the past proceedings, and to *extend the jurisdiction*, and to amend the practice of these Courts." The 10th section of this Act defines the matters in respect of which the Vice-Admiralty Courts have jurisdiction, amongst others, as follows:

1. Claims for seamen's wages.
2. Claims for master's wages, and for his disbursements on account of the ship, &c.

In the last edition of Roscoe's Admiralty Practice at page 86, I find the following note in regard to seamen's wages:—"A suit for wages under £50 cannot be maintained in the Vice-Admiralty Court by section 189 of the Merchant Shipping Act; but the Act of 1863 (the Vice Admiralty Courts Act, 1863) contains no such limitation." The words used in section 10 are:—"The Vice-Admiralty Courts shall have jurisdiction in respect of claims for seamen's wages." The enacting words are without limitation or restriction. The Act was passed to extend, not to limit, the jurisdiction. And were it not for the judgment pronounced in the Vice-Admiralty Court of Quebec in the *Margaretta Stevenson*, I would see my way clearer than I do. The head note to the printed report is as follows:—"The Merchant Shipping Act, 1854, excludes the Admiralty jurisdiction in suits for wages, etc., where the amount is less than £50." That is good law so far as it goes. The Merchant Shipping Act certainly excludes this jurisdiction; but on reading the printed report of the case, I find no reference to the Vice-Admiralty Courts Act, 1863, in any shape or form. It is possible the 10th section was not brought under the consideration of the Court; and it does not appear that the point now contended was argued before the learned Judge at all. If this was a judgment of the Supreme Court on the point in question, I would yield my own opinion at once; but it is the judgment of the Vice-Admiralty Court of another Province, not binding here, although entitled to every respect and consideration. But I feel bound to pronounce the law as I understand it, that the Court has jurisdiction over causes for wages for sums less than £50 under section 10 of the Vice-Admiralty Courts Act, 1863. The Act was in force when the Maritime Jurisdiction Act, 1877, passed, and the Maritime Court under it organized. The Maritime Court of Ontario, under section 2, has in all matters enumerated in section 1 such jurisdiction as belongs in similar matters to any existing British Vice-Admiralty Court in similar matters within the reach of its process.

I may add as matter of information that this Court has acted upon the idea that it had jurisdiction in respect of claims for wages for amounts under £50. The first proceeding in-

stituted in the Maritime Court *in rem* was against the *Belle Sheridan*, when the claim was $129. Several vessels have been arrested and sales effected when the first proceeding *in rem* was for amounts under £50. On the 10th day of November last, 1879, owing to the improper and extravagant use made of the process of the Court in matters of costs in small amounts for wages, the Judge of this Court made the following rule, in addition to former rules, that is to say:—Additional rule 276: "Two or more persons having claims against the same property for wages or for necessaries may join against the same property in one petition, and unless the sum or sums adjudged to the claimant or claimants, in a petition in a cause of wages, or of necessaries, amount to the sum of $100 at least, no costs shall be allowed to the claimant or claimants, as the case may be, unless under all the circumstances the Judge or Surrogate Judge thinks proper to allow a sum in gross not exceeding $10 in lieu of all costs."

This rule was made here on the 10th day of November, 1879, sanctioned by the department of Justice at Ottawa, and approved by His Excellency the Governor-General in Council on the 21st of November, 1879. This rule acknowledges to all intents and purposes that the Maritime Court has jurisdiction when claim for wages is under £50.

I must rule this point against the defendant.

When framing the additional rule 276 in November, 1879, I tried to frame a rule to the effect that no proceeding *in rem* should be instituted in the Court or property arrested under its process unless in case of wages, the claim should amount at least to $100, or the joint claims of two or more petitioners should in the whole amount to at least $100, and that power should be conferred on the Police Magistrate or two Justices of the Peace to proceed in a summary manner to hear and determine cases of wages due to seamen, and for necessaries when the amount does not exceed $100. But on consultation I became satisfied that such a rule would be *ultra vires*, and that such a change would require to be effected by legislation, and I hope that a bill will be brought into Parliament to prevent proceedings *in rem* being instituted for wages and necessaries when the claim is under $100.

The next point is that the petitioner is not a seaman within the meaning of the Acts. The Seamen's Act, 1873, and the Seamen's Act, 1875, were cited in support of this contention.

I think there is enough set out in the petition to show that the petitioner was a seaman, hired according to law. It is alleged in the petition that the petitioner was hired by the master of the tug *Robb* as a deck-hand, and by virtue of the said contract of hiring he was to have had his board and lodging in the said vessel, and $15 a month for wages, and that the petitioner went on board the said tug under the said contract of hiring, and remaincd therein until he was wrongfully discharged. I do not think it necessary to allege as a matter of pleading that the contract of hiring was in writing.

In declarations on contracts that should be in writing under the statute of frauds and other statutes, it is not necessary to allege that such contracts were in writing. At the trial is the proper time to take objection, and if the contract ought to be in writing the petitioner must fail. It is competent to him on the present petition to prove a contract in writing. It is not necessary to decide here whether the contract specified in the petition should be in writing or not, under the Dominion statutes.

The next and last point urged on behalf of the defendant is that the claim is not a claim for seamen's wages, but a claim for damages for a wrongful dismissal. The head note to the case of the *Great Eastern*, L. R. 1 A. & E., 384, is as follows:—"In a cause of wages, the Court of Admiralty has jurisdiction to entertain a claim by a seaman for compensation in the nature of damages for wrongful discharge before the term of his engagement has expired." Dr. Lushington, the Admiralty Judge, pronounced through the Registrar the following judgment:—"The result is that the Court of Admiralty has, in a cause of wages, jurisdiction to entertain a claim for compensation for wrongful discharge of the seaman during the term of his engagement." *The Blessing*, L. R. 3 Probate Div. 35, was an appeal from the County Court of Durham demurring, for want of jurisdiction, to an action "for wages and wrongful carrying of certain goods." The appeal was argued before Sir Robert Phillimore, who held that the words "any claim for wages," in the 3rd section of the County Court Admiralty Jurisdiction Act, 1868, include a claim for damages for

wrongful dismissal by the master of a vessel engaged under special wages agreement. The words "claim for wages," used in the County Court Admiralty Jurisdiction Act, 1868, and in the Vice-Admiralty Court Act, 1863, are the same. In the face of the cases of the *Great Eastern* and the *Blessing*, just referred to, this point must be decided against the defendant.

On the whole, the judgment of the Court should be for petitioner, and the demurrer overruled.

Demurrer overruled.

IN THE FOURTH DIVISION COURT—COUNTY OF ONTARIO.

BURT V. WALLACE.

Mechanic's lien—Division in which to issue summons—Form of order.

Where a Mechanic's Lien is within the jurisdiction of the Division Courts, the summons should be issued and the order be made in that division in which the cause citation arose or the defendant lives.

This was an application by summons to the junior judges of the county of Ontario for an order for sale of lands, in the township of Uxbridge, under the Mechanics' Lien Act. The amount of the lien was $85, and the contract was made, and the defendant resided in Uxbridge.

His Honour refused a summons as County Judge, but directed one to issue, in the terms asked for, from the Uxbridge Division Court, that being the division in which the cause of action arose, and also in which the defendant resided. On the return of the summons, the parties were heard.

DARTNELL, J. J. The lien is proved and the defendant is shewn to have an equitable interest upon which it will attach. The order will be for payment in a month, or in default a sale. No sale can take place for 12 months, and as the Division Court has no machinery for the sale of lands, the sale will be by the judge, acting as if a Master in Chancery.

His Honour subsequently settled the following form of order:—

In the Division Court—In the matter of the Mechanics' Lien Act, and between A. v. B.

This matter and cause coming on before me G. H. D., J. J. C. O. upon reading the summons granted herein, and the several enlargements thereof, and upon hearing the parties by their agents, and the witnesses adduced on their behalf.

I declare that the plaintiff has a lien upon the estate and interest of the defendant in the following lands and premises, viz., under the Mechanics' Lien Act for the value of the materials provided and work done as hereinafter mentioned, but subject nevertheless to a vendor's lien for unpaid purchase money in favor of one C. M. for $

And I find there is due to the plaintiff for the said value of the materials provided and work done the sum of $ and I have computed interest on that amount from the 1st July, 1880, until the time hereinafter appointed for the payment and find the same amounts to $ and I find the costs of these proceedings amounts to the sum of $, which in all amounts to the sum of $, and upon the defendant paying that sum into the (*name of Bank*), to the joint credit of the plaintiff and the clerk of the said court, between banking hours of the 6th day of February next, I do order and declare that the said plaintiff do release and discharge his said lien; but in default of the defendant making such payment by the time aforesaid, I do order and decree that the estate and interest of the said defendant be sold by public auction, tender or private contract, with the approbation of the Judge of the said Division Court, and the purchaser is to pay his purchase money into the said Court to the credit of this cause, and the said Judge is to settle the conveyance to the purchasers, in case the parties differ about the same, in which all proper parties are to join as the said Judge shall direct.

And I do further order and decree that the purchase money, when so paid in, shall be applied: 1st. In payment to the said plaintiff of his costs of this suit. 2nd. In payment to the plaintiff of the amount so due to him for principal and interest; and the residue of the purchase money I direct to be paid to the said defendant But in the event of the purchase money being insufficient to pay the claim of the plaintiff, with subsequent interest and costs, I do order that the defendant do pay to the plaintiff the amount remaining due to him forthwith after service upon him of this order and the said Judge's certificate of such deficiency.

Dated, &c.

LAW STUDENTS' DEPARTMENT.

EXAMINATION QUESTIONS.

(Continued from p. 49.)

7. What provision as to costs is made by statute in case of an action against two or more joint contractors, where one is barred by the Statute of Limitations of King James the First, and the remainder are not so barred?

8. Why is it advisable that persons endorsing bills of exchange or promissory notes should write their P. O. address after their names?

9. Give a short sketch of the powers of our Supreme Court in relation to legislation.

SECOND INTERMEDIATE.

Leith's Blackstone—Greenwood on conveyancing.

1. Sketch the process by which lands were originally withdrawn from general ownership, and became vested in particular persons.

2. What disposition would natural law make of the estate of deceased persons? Trace the development of the law with respect to such dispositions, down to the period at which devises by will were permitted.

3. What laws govern in the case of one country being annexed by another?

4. Give the requisites of a rent.

5. What was the origin of the feudal system? Trace, shortly, the qualifications which it underwent down to its extinction in Ontario?

6. Enumerate the various estates in land, giving them according to their proper classifications.

7. Detail the practice between conveyancers upon a sale and conveyance of land.

CERTIFICATE OF FITNESS.

Equity Jurisprudence.

1. What transactions between the creditor and the debtor not communicated to the surety (1) will, and (2) will not, discharge the surety?

2. To what extent has the doctrine of equity respecting equitable liens, charges, or interests, affecting land, been affected by the legislation of Ontario?

3. What is the distinction between the cases of (1) a plaintiff seeking, and (2) a defendant resisting, specific performance of a contract?

4. Define waste; and explain the jurisdiction (1) of equity and (2) of common law with regard to waste.

5. What is the distinction between (1) terms in gross, and (2) terms attendant upon the inheritance?

6. Is it necessary that a married woman should sue in equity by a next friend?

7. On what grounds will equity relieve against a foreclosure for breach of covenant, other than a covenant to pay rent?

8. State the extent of equitable jurisdiction conferred upon the Courts of Common Law, and of jurisdiction in Common Law conferred upon the Court of Equity by recent legislation in Ontario.

9. What is the practice in reviving an abated suit (1) before, and (2) after decree?

10. State the provisions of the Ontario statute respecting voluntary conveyances.

EXAMINATION FOR CALL.

1. What three requisites are there to every simple contract?

2. What technical words must be used in indictments for (1) Murder, (2) Treason, (3) Felony, (4) Burglary, (5) Forgery, (6) Misdemeanor.

3. By what legislative authority are (1) Criminal Courts established, (2) Crimes defined, and (3) Criminal procedure prescribed?

4. In what cases is a wife not competent to give evidence for or against her husband?

5. In what criminal prosecutions other than for perjury must the evidence of an interested person be corroborated?

6. What are the statutory provisions in respect of (1) pleadings, and (2) right of set-off, where an assignee of a *chose in action* sues the original debtor?

7. What are the statutory provisions as to the liability of a person making representations respecting the (1) character, (2) credit, and (3) trade of another person?

8. To what places may subpœnas be issued in cases depending in (1) Criminal Courts, (2) Superior Courts in civil cases, (3) County Courts, and (4) Division Courts?

9. What is domicile, and how does it affect contracts in respect of real or personal estate?

10. Define "allegiance," and state how far recent Imperial legislation has affected that question?

CORRESPONDENCE.

Chattel Mortgages.

To the Editor of the CANADA LAW JOURNAL.

SIR,—If M. J. G. will examine again the case of *Gilleland* v. *Wadsworth*, 1 App. Rep. 82, I think he will find that he has, on the point he alludes to, drawn an erroneous conclusion.

The defendant was affected with notice of the assignment of the mortgage in question, because he purchased, or rather acquired, the lands by exchange, *after* the *registration* of the *assignment*—See *Trust and Loan Co.* v. *Shaw*, 16 Gr. 448, and Mr. Justice Moss's reference to it at page 91 of the report of *Gilleland* v. *Wadsworth*. Had the mortgagee paid Currie in ignorance of the assignment, though it had been duly executed and registered, he would have been protected. At the same page Mr Justice Moss says :—"The registration of the assignment would not be notice to Brown, because a mortgagor paying off his mortgage does not come within the class of persons to whom registration constitutes notice."

I still think that a mortgagor of chattels can pay or satisfy the mortgage to the mortgagee, even after its assignment and registration, if he does so in good faith and without actual notice of the assignment.

A purchaser would, of course, stand upon a different footing.

Yours, &c.,

LEX.

To the Editor of the CANADA LAW JOURNAL.

SIR,—In the LAW JOURNAL for October, under the heading of "Reviews," you have devoted considerable space to a notice of Mr. Barron's work upon Bills of Sale and Chattel Mortgages, and in it you quote from the author's remarks upon sec. 6 of the act; he there states of the words "hereinafter provided," "it is worth while observing them carefully. Mortgages within this section shall be valid and binding when *registered as hereinafter provided*; and there is nothing in the act subsequent to this section in any way limiting the period within which mortgages under this section are to be filed." He goes on to say "unless mortgages under section six come within the meaning of section one, it is quite clear that the statute has fixed no period of time within which mortgages under this section are to be filed." He then proceeds to argue that, in his opinion, "there can be but little doubt that they are not so included, because section one was passed 12 Vic. cap. 74, and section six not until 20 Vic."

I do not think Mr. Barron's reasoning is well founded.

The words "every mortgage," in section one, are wide enough to cover a mortgage under section six, and in section one it is required that "within five days from the execution thereof they shall be registered as hereinafter provided." Section five contains similar language as to Bills of Sale. Section six states, "and in case such mortgage is registered *as hereinafter provided*, the same shall be valid, &c."

By the Act of 20 Vic. cap. 3, the Acts of 12 and 14 Vic. were repealed, and their provisions embraced in that act, with the addition, among others, of what is now section 6 of R. S. O. cap., 119.

Section one provides that "every mortgage, &c., intending to operate as a mortgage of goods and chattels, &c."

Section six is confined to particular classes of mortgages only.

The time for registration of all mortgages is fixed by section one.

Section seven provides how or where they may be registered.

I think Mr. Barron has attached too much weight to the words "hereinafter provided." I understand those words to mean the manner in which they shall be registered, and to have no reference to time; and I think the Act clearly shows this, because the time for registering is repeated in section five, in the case of Bills of Sale, showing that the Legislature was fully alive to the fact that the words "every mortgage or conveyance intending to operate as a mortgage," in section 1, would not cover the case of an absolute sale under section 5. Further, it is common with lawyers in conveyancing to say "at the time and in the manner hereinafter stated," thereby always understanding that the manner of doing an act does not refer to the time of doing it. The word "as" in the Act is there used in the same sense and has the same meaning as the words "in the manner" would have.

For my part, whilst fully appreciating the merits of Mr. Barron's work as a desideratum, I cannot see that there was ground for his opinion upon section 6.

N. F. PATERSON.

Canada Law Journal.

VOL. XVII. FEBRUARY 15, 1881. No. 4.

DIARY FOR FEBRUARY.

2. Wed....Final Examination for Attorneys.
3. Thurs..Final Examination for Call.
4. Fri.....Final Examination for Call with honours.
6. Sun.....5th Sunday after Epiphany. Hagarty, C. J., C. P., [sworn in, 1856.
7. Mon...Hilary Term begins.
10. Thurs..Queen Victoria married, 1840.
11. Fri.....R. E. Caron, Lieut.-Governor of Quebec, 1873.
13. Sun....Septuagesima Sunday.
14. Mon...Last day to move against Municipal Elections.
15. Tues...Supreme Ct. sitt.
17. Thurs.-Re-hearing Term in Chancery begins. William Os- [goode, first C. J. of U. C., died 1824.
18. Fri.....Canada settled by the French, 1534.
19. Sat.....Hilary Term ends.
20. Sun.....Sexgaesima Sunday.
27. Sun.....Quinquagesima Sunday. Sir John Colborne, ad-
28. Mon....Indian mutiny began, 1857. [ministrator, 1838.

TORONTO, FEBRUARY 15th, 1881.

THE labours of Messrs. Robinson and Joseph in the publication of their digest of Ontario Reports is now at an end, and the result is before most of our readers. We must defer our remarks on the subject until our next issue.

THE Government at Ottawa has, as yet, given no sign as to who is to take the vacant seat in the Court of Appeal. There are so many rumours and so conflicting, that it is difficult to keep pace with them. The general feeling is, we believe, in favour of the appointment of the Chancellor, or of Chief Justice Hagarty; the former, more likely, as it is said an "Equity" Judge would be desirable to fill the place of the late lamented Chief.

THE remains of the late Chief Justice Moss, were interred on the 9th inst., in the St. James' cemetery. The University authorities and the Law Society were both desirous of showing their respect to the memory of the deceased by a public funeral; but at the request of his widow, the ceremony was of a simple and private character, attended only by his brother Judges and personal friends. The memory, however, of one of Canada's greatest sons is engraved on the hearts of those who knew him, and written on the pages of our history.

WE publish in this number some further decisions by County Judges which will be read with interest. Division Court procedure is not, perhaps, a study much relished in Toronto; and the habit here is to despise it. In country places, however, this is not so much the case, and it cannot be denied that as the local courts increase in their jurisdiction, so will professional interest increase in their practice. The decision of Mr. Justice Cameron in *Mead* v. *Creary*, *post* p. 82, is also an important one in this connection.

THE last case as to the rights of the finder of lost money seems to be *Hamaker* v. *Blanchard*, in the Supreme Court of Pennsylvania. The finder was a servant girl who picked up a roll of bills in the parlor of a hotel. The girl handed the money to her master, to be given to the supposed owner. As, however, this individual did not turn up, the finder brought suit to establish her right to the money; and it was held that she was entitled to it as against all the world but the rightful owner. The decision, though in accordance with well established principles, is somewhat a blow to the domestic maxim that "all waifs and strays belong to the mistress of the house."

The following advertisement appears in an Oshawa paper:

"I am prepared to do all manner of conveyancing at charges lower than any one in town, also to collect accounts, attend to Division Court business, collecting of rents, letting houses, posting books and making out accounts, etc.

"N.B.—Legal advice free of charge."

The extract from which the above was taken has been sent to the Attorney-General, so that the proper authority may know the kind of thing country practitioners are subjected to. The man who has the cheek to advertise as this impostor does has also the hardihood to give advice to any one on any subject brought before him. The not unlikely result might be ruin to the person advised. It will be no answer in the mouth of those who are responsible for legislation that "it served him right." The ignorant public ought to be protected as well against legal quacks as against medical quacks. How legislators can reconcile it to their legisla ive conscience to give this subject the go by we cannot understand.

RIGHT OF QUEEN'S COUNSEL TO DEFEND PRISONERS.

Though the legal atmosphere has been much disturbed of late by the questions whether the Dominion or a Provincial Government has the right to appoint a Queen's Counsel, and whether such appointment confers a "title of honour," and so comes from the Crown as *fons honoris*, or means only an "office," or a general retainer from the Crown, which entitles the barrister holding a patent as "oneof Her Majesty's Counsel learned in the law" to pre-audience in Court, owing to "the dignity of his client," nothing has as yet been said respecting the peculiar duty of a Queen's Counsel—long known and still recognized in England—not to appear against the Crown in any civil or criminal cause unless by special license.

In Gude's Crown Practice (v. 2, p. 599) a form of petition for this license is given. It sets forth that the petitioners are prosecuted at the suit of the Crown, and then proceeds "That——, one of Your Majesty's Counsel learned in the law would be very useful for your petitioners in defending them therein. Your petitioners therefore humbly beg Your Majesty would be graciously pleased to grant your Royal dispensation to the said ——, to be of counsel for your petitioners in their defence."

The form of license is given at p. 390 of the same work, and after reciting the petition, reads: "We being graciously pleased to condescend to this request, do accordingly, by these presents, dispense with the said——, and grant him our Royal license to be of counsel," etc. A note to the form states: "The certificate from the Secretary of State's office is considered sufficient for counsel to authorize him to receive the brief, without having the license itself."

The relations of Queen's Counsel to the Crown, may be better understood when it is stated that the two principal members of that select body, are Her Majesty's Attorney and Solicitor-General; and if either of these counsel who are more especially Her Majesty's law officers can, without license, take briefs against the Crown, *a fortiori*, may those holding the subordinate rank and office of Her Majesty's Counsel, take briefs and be engaged in causes against the Crown.

The first barrister appointed by the Crown to be a Queen's Counsel was Lord Bacon, in 1590. His appointment was that of Counsel Extraordinary to the Queen; but no fee was then attached to the office. Soon after the accession of James I, he was constituted by Letters Patent, "King's Counsel," having been previously knighted.

The next appointment of King's Counsel was in 1668, when Sir Francis North received a silk gown. It is said that, being desirous of making himself known at Court as an anti-Parliamentarian lawyer, he volunteered to argue for the Crown before the House of

Lords the great Parliamentary case of the *King* v. *Sir John Elliot, Denzill Hollis, and others*, (3 St. Tr. 294,) and his argument so pleased the Duke of York (afterwards James II.) that he induced the King to appoint him one of His Majesty's Counsel.

From early days a fee or retainer of £40 a year was attached to the office. Some writers say that Lord Bacon was the first to receive this fee; while others say that Sir Francis North received £40 as his fee in the case referred to, and that thenceforward it became the annual fee or retainer of a King's or Queen's Counsel. And after 6th Anne, c. 7, s. 24, (1708) the appointment was held to confer an "*office* of profit," which disqualified a member of the House of Commons from sitting in Parliament, without re-election. (*a*)

It seems to have been the rule as early as Sir Francis North's time, that a King's Counsel could not appear in any civil or criminal cause against the crown. In the civil case of *Smith* v. *Wheeler*, 1 Mod. 38, (1669) the reporter states:

"In this case Serjeant Maynard was about to argue that the residue of the term was not forfeited to the King.

Kelynge, C. J., Brother Maynard you would do well to be advised, whether, or no, you being of the King's Counsel, ought to argue against the King?

Maynard answered, that the King's Counsel would have but little to do, if they should be excluded in such cases; and that Serjeant Crew argued Haviland's case in which there was the like question.

Twisden, J. In *Stone and Newman's case*, Cro. Car. 427, I know the King's Counsel did argue against estates coming to the Crown; but if my lord thinks it not proper, my brother Maynard may give his argument to some gentleman of the bar, to deliver for him." And thereupon Serjeant Maynard handed his brief to Mr. Jones, who argued the case the following Term.

The next authority in order of date is Sir William Blackstone. In the 3rd vol. of his Commentaries, p. 30, he says: "The King's Counsel answer, in some measure, to the advocates of the revenue, *Advocati fisci*, among the Romans. For they must not be employed in any cause against the Crown, without special license, in which restriction they agree with the advocates of the fisc."

Mr. Christian, in his edition of Blackstone, adds: "Hence none of the King's Counsel can publicly plead in Court for a prisoner, or a defendant in a criminal prosecution, without a license, which is never refused."

Coming down to later times, we find that in the case of *Regina* v. *Jones*, 9 C. & P. 404, Mr. Cresswell, Q. C., was instructed to argue the case for the prisoner on a point reserved for the consideration of the fifteen Judges. The reporter states:—"The case was to have been argued before the Judges in Easter Term, 1840; but it being stated by C. Cresswell, who was instructed to argue for the defendant, that he had not obtained a license from Her Majesty, under the royal sign manual, to argue against the Crown, and that he had only received a certificate from the Secretary of State's office, the Judges directed the case to stand over till Trinity Term, that Her Majesty's license might be obtained."

The reporter adds in a foot note that, "The Attorney and Solicitor-General, a Queen's Sergeant, or a Queen's Counsel, can not appear in a case against the Crown, (even

(*a*) In ordering a writ for a new election it was called "the *office* of one of His Majesty's Counsel learned in the law." The constituencies vacated by the appointment were: *Berealston* (1715), 18 Com. Jour. 334; *Higham Ferrers* (1726) 20 Com. Jour. 722: *Newport* (1730) 21 Com. Jour. 587; *Dorchester* (1735) 22 Com. Jour. 563; *Stamford* (1737) 23 Com. Jour. 22; *Dorchester* (1742) 24 Com. Jour. 333; *Cirencester* 1745) 25 Com. Jour. 35; *Bath* (1751) 26 Com. Jour. 299; *Knaresborough* (1765) 30 Com. Jour. 441; *Calne* (1815) 70 Com. Jour. 73; *Newport* 1816) 71 Com. Jour. 164; *Plympton Earle* 1824 79 Com. Jour. 501.

if the Crown be a nominal party only) without a license under Her Majesty's sign manual. To obtain the license a petition is presented to Her Majesty. This petition is left at the Secretary of State's office, and a sum of £1. 10s. paid, on which a certificate is given; and the license is then prepared, to which Her Majesty's sign manual is obtained. Serjeants, and Counsel who have Patents of Precedency, may appear in cases against the Crown without any such license."

Serjeant Woolrych, in his Lives of Eminent Serjeants (p. xvii.,) explains the origin of these latter appointments. "The King's Counsel were gratified with a salary of £40 per annum. The rank thus salaried was held to be an office under the Crown. Hence, when a member of Parliament became King's Counsel he vacated his seat. This was, in more senses than one, a manifest inconvenience. A new election is ill-relished by the member; and if he were of the party of the Government, the loss of a supporter was hazarded. A remedy suggested itself. By investing the fresh 'silk gown,' with a 'Patent of Precedency,' the person on whom it was conferred received no salary, and consequently was not an officer of the Crown, and thus retained his seat. And he had this further advantage. He was to take precedence next after the King's Counsel last made, and his leadership at the Bar was thus secured to him. He had also the right to be called within the Bar."

In the case of *Regina* v. *Bartlett*. 2 C. & K., 321, at the Hereford Assizes in 1846, Mr. Whateley, Q. C., before the case was called, stated that a brief had been delivered to him for the defendant in the case of a criminal information, at the suit of a private prosecutor, and that a letter had been sent to the Secretary of State for the Home Department, to ask that a license might be granted to him, as a Queen's Counsel, to allow him to plead against the Crown, but to this letter no answer had, as yet, been received. He stated that he felt a difficulty in the matter, as he had been informed that on the Norfolk circuit a Queen's Counsel had conducted the defence of a misdemeanor after an application had been made to the Secretary of State for a license, and before an answer was received, it being considered that after such an application, a license was always granted as a matter of course, if the case was not a Government prosecution.

The Lord Chief Justice, (Sir Thomas Wilde, afterwards Lord Chancellor Truro,) said, "I think there must be a license, or at least a letter from the Secretary of State."

The reporter adds, "As neither a license nor a letter from the Secretary of State arrived before the trial of the case, Mr. Whateley returned his brief."

In Cox's English Government (1863) the writer says (p. 375) "Queen's Counsel, or Her Majesty's Counsel learned in the law, are barristers who by an honorary appointment as servants of the Crown, obtain certain rights of pre-audience at the Bar. They have a nominal salary as servants of the Crown, and must not be employed in any cause against its interest without special license from the Crown which is, however, never refused."

Without citing further authorities we may add the following from the Transactions of the Juridical Society (vol. 2, p. 483): "Queen's Counsel have practically no duties whatever, corresponding to their title; for the most part, they have never to advise or act for the Crown; and they undertake no responsibilities by virtue of their appointments, beyond the negative duty of not appearing against the Crown, unless licensed so to do."

The result of these authorities would seem to be that, if Queen's Counsel in this country are "officers of the Crown," and occupy a position analogous to that of Queen's Counsel in England, they cannot appear in civil or criminal causes against the Crown without a license. But if their position is analogous to that of Barristers with patents of precedency there, then they are not restricted in the

cases they may be retained to defend, and may without such license appear in cases against the Crown.

The question is one for those holding the "office" of Queen's Counsel to consider and settle; or failing their doing so, then it may be raised by some daring "junior" in a criminal trial in one of our Courts, and the status of Queen's Counsel again discussed, together with the further question: whether a Patent of Precedence, instead of a Patent as Queen's Counsel, would be more appropriate recognition of professional rank in this country.

T. H.

THE DECLINE OF CIRCUIT LIFE.

There appeared in a recent number of the *Law Review* an article on this subject, which, though its practical importance is confined to the English Bar, cannot fail to possess considerable interest from a literary and historical point of view for members of the profession everywhere. The writer, after referring to the momentous changes which have been effected of late years in legal practice, in spite of the traditional conservatism of lawyers, calls attention to the fact that the leaven of innovation is beginning to work even in matters of social and professional organization, such as the forms and customs which have been from time immemorial associated with the circuits. In his opinion "it requires no seer's vision to perceive that the old spirit of the circuit life has fled: that there have long been, and still are, influences at work that are slowly altering and new moulding the circuit system, which influences, in spite of the retention of old names and observances, are likely at no distant date to accomplish the complete effacement of the old circuit system with all its attendant observances."

Among these influences, not the least potent are the marvellously increased facilities of locomotion which have been introduced during the present century. The "pomp and circumstance" which in olden times attended upon the advent of the judges in the assize towns, and the time-honoured observances associated with the circuits, were intimately connected with the slowness, and consequent dignity, of their movements. When the headlong speed of railway trains supplanted the dignified discomfort of the post-chaise in the office of carrying the ministers of justice to their destination, a fatal blow was dealt at many old customs and observances connected with circuit life, which were felt to be mere relics of feudalism, and no longer suitable to the changed conditions of modern life. In this, as in many more important matters, "the old order changeth, yielding place to new," and habits and customs which were full of a living interest and significance for one generation, become in the next the objects of antiquarian curiosity, or, at most, of a sentimental regret. The following passage furnishes a curious illustration of the inconveniences entailed upon the counsel who went the Northern Circuit in the good old days of bad roads and rumbling post-chaises: "So important a feature was the question of roads and locomotion considered "upon the northern iter," that when the business at any Assize town extended into the Commission Day of the next town, counsel were privileged to appear in court that day without their robes: the reason being that ordinarily these would have been consigned to the baggage-waggon, or the clerks, and were already *en route* for the next circuit town. Long after the reason for it had ceased to exist this rule was religiously observed by the members of the Northern Circuit as one of their especial privileges, and on the last occasion of its observance, not many years ago, we recollect how shocked the judge who, in the days of his youth, had been at the Equity Bar, looked at the indignity put upon him, as he supposed, by this want of dress, and his puzzled and not altogether

satisfied look, even after the explanation had been given and the privilege claimed."

It must be admitted that the great advances which have been made in modern times in travelling facilities and other conveniences have been accompanied by the elimination, to a certain extent, of those elements of romance and adventure which the art of the poet and the novelist have taught us to associate with the less easy and comfortable life of our forefathers. This, however, is a loss which the Canadian judge or counsel can bear with equanimity, as his luxurious 'Pullman' carries him with speed and safety to his destination, especially when he reflects on the hardships and perils which his less fortunate predecessors were often called on to endure. We quote from the article in the *Law Review* a passage which throws the contrast of the present and the former days into strong relief.

"In those days there was a certain amount of romance and adventure in circuit life—when Thurlow rode the Western Circuit on a horse procured 'on trial;' Eldon went the 'Northern iter' on a hired horse, but was obliged to borrow one for the youth who rode behind him, in charge of the saddle-bags, in the capacity of clerk; and North, afterwards Lord Keeper Guilford, when riding the Norfolk Circuit, got mellow and had to be put to bed in a public-house, while 'the rest of the company went on for fear of losing their market' (Campbell's *Lives of the Chancellors*, Vol. III., p. 441). Even the perils of the road had to be shared by the gentlemen of the long robe in comparatively recent times. Thus we find that Mr. Wood and Mr. Holroyd (both of whom were afterwards raised to the Bench), when crossing Finchley Common on their way to join the Northern Circuit, were stopped by a gentleman of fashionable appearance, who rode up to the side of the carriage and begged to know 'what o'clock it was.' Mr. Wood, with the greatest politeness, drew out a handsome gold repeater and answered the question; upon which the stranger, drawing a pistol, presented it to his breast and demanded the watch. Mr. Wood was compelled to resign it into his hands, and the highwayman, after wishing them a pleasant journey, touched his hat and rode away. The story became known at York, and Mr. Wood could not show his face in court without some or other of the Bar reminding him of his misfortune by the question, 'What's o'clock, Wood?'

Even supposing the circuiteer was fortunate enough to escape falling into the hands of highwaymen and to accomplish his toilsome journey to the assize town in safety, his troubles were by no means at an end. During that journey he had been debarred from availing himself of any public mode of conveyance, lest he might thereby fall into company with some attorney, and so get an unfair advantage over his brethren in the all-important matter of securing briefs—so strict in those days was the etiquette of the profession,—so sternly was its face set against the contamination of 'base fees!' This so reprobated practice of cultivating the good graces of the attorneys was termed "hugging," a crime the temptations to which were felt to be so powerful, that the most vigorous penalties and restrictions were resorted to in order to check and punish it. "Arrived at the circuit town, he (*i. e.* the barrister on circuit) could not enter it before the Judges, or at least not before mid-day of the Commission Day, so that all might have a fair start in the race for briefs; and even when he had got within the 'happy hunting grounds,' he was not allowed to stay at, or frequent, any public inn, lest the same temptations to 'hugging' and other undue influences should be presented to him—but he must go into lodgings, for which, of course, he had generally to pay an exorbitant price, there being no keener appreciators of circuit etiquette than the landladies. In some of the northern towns they used to adopt a sort of sliding scale of charges—a certain price if you had no business, an extra guinea if you

had. If he was fortunate enough to know an attorney in the place, or be related to one there, he could not stay with him, or dine with him, or even call on or be civil to him, without contravening the circuit code; and were he even known to utter, in public, his opinion that any attorney 'was a most estimable and highly respectable gentleman,' he was certain to have to pay a fine to the circuit mess. Even the very judges were, so to speak, strangers in the land, an old statute of the 8 Richard II., making it unlawful for any one to ride circuit in a county of which he was a native, or in which he inhabited, without a writ of *non obstante*."

This old-fashioned strictness of professional etiquette undoubtedly had a beneficial effect in establishing a high standard of honour amongst the members of the Bar; it must also have had a tendency to foster those social and friendly sentiments which are still, as we believe, the distinguishing characteristic of the "learned brothers" of the Bench and the "learned friends" of the Bar, although, from the changed circumstances of the times it which we live, they no longer find expression in the "High Jinks" of the circuit mess, or the Revels of the Inns of Court. Strange, indeed, to nineteenth century ideas at least, were the sights to be seen at these revels, "where, as in the Middle Temple Hall, the Master of the Revels after dinner sang a 'carroll or song, and commanded other gentlemen there then present to sing with him and the company;' or when, as in Gray's Inn, after dinner, 'a large ring was formed round the fire-place, when the Master of the Revels taking the Lord Chancellor by the right hand, with his left took Mr. Justice Page, who, joined to the other Serjeants and Benchers, danced about the coal-fire according to the ceremony three times, while the ancient song, accompanied with music, was sung by one Toby Aston, dressed as a barrister,' in 1773."

In reading the accounts of this joyous legal Saturnalia, and contrasting it with the grave and business-like way in which the lawyers of the present day take their relaxations, one is tempted to believe that Wordsworth was right in saying that "the world is too much with us," and that in the stress and hurry of modern life, men have forgotten the art of amusing themselves, and as the witty Frenchman said, take their pleasures too sadly. No such indictment will lie against the intellectual giants of Bench and Bar in the olden days, when it was thought no matter for surprise or blame "that an occupant of the Woolsack, when a member of the Oxford Circuit, should have occupied the office of Cryer, holding a fire-shovel in his hand as the emblem of his office; that Lord Eldon, while he was Attorney-General of the Northern Circuit mess, indicted Sir Thomas Davenport at the Grand Court at York, for murdering a boy 'with a certain blunt instrument of no value, called a long speech;' or that Serjeant Prime was fined by the Grand Court of his circuit for setting a boy to sleep by his eloquence." It was then thought an excellent joke "that a late Chief Baron had been crowned with a punch-bowl at York, 'in the days when he went circuiting;' and that such men as Alderson, Tindal, Serjeant Cro:s, and others joined in a quadrille to the tune of 'Fol de rol rol,' but Alderson, setting-off wrong, put the rest out, and the whole was soon a scene of confusion."

It must not be forgotten that all this unrestrained hilarity and practical joking was associated with those sentiments of professional honour and friendship which it was the special aim of the Circuit Courts to countenance and promote, and we may fitly close this article with a final quotation from the source from which we have already drawn so largely: "There seems to be a general consensus of opinion as to the tendency of the amusements of the circuit table to promote friendship and to bring the leaders of the profession in contact with the juniors, and thus produce a feeling of harmony and good will amongst the Bar, which was productive of

he best effects. The terms of intimacy in which the counsel who went the circuit lived, are pointed to as one of the chief characteristics of those days; and the free interchange of opinions between seniors and juniors as giving rise to sentiments of kindness and respect; and indeed, the strictness with which the etiquette of the Bar is maintained in England is alleged to be owing, in a great measure, to the institution of the Circuit Court for the trial of all breaches of professional etiquette."

Such, amid what may appear its grotesque follies, were the ends aimed at, and in no small measure attained by the circuit life of bygone times, and in these present days when some (though happily but few) members of the profession are not ashamed to borrow the advertising arts of the quack and the Cheap John, we may be permitted to pay its departed glories the tribute of a respectful regret, and to express the hope that however its forms may change and decay, its spirit and essence may never wholly pass away.

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEENS BENCH.

VACATION COURT.

Osler J.] [Jan. 21.

IN RE EGLESTON V. TAYLOR.

Award void pro tanto.

In an award which is valid as to part and void as to remainder, if the void part can be separated from that which is valid, it should be rejected as surplusage.

In such a case, the proper course to pursue is to discharge generally a rule to set aside the award.

See Rees v. Waters, 16 M. & W. 263, *and Re Goddard & Mansfield*, 1 L. M. and P. 25.

Spencer, for the Rule.

J. E. Rose, contra.

CRATHERN V. BELL.

Continuing guarantee—Payment to person not the holder of.

The defendant gave to the plaintiff a guaranty in the following words :—" In consideration of C. & C. accepting the notes of J. G., at four, eight, and twelve months, for $751 each, in full satisfaction and discharge of their claim against the late firm of J. G. & Co., I hereby do, to the extent of $751, guarantee the payment of the first two of the said notes as they mature according to their tenor and effect." C. & C. endorsed the first note to persons to whom at maturity the defendant, at G.'s request, paid $275, being the extent to which G. was unable to meet the note. On the maturity of the second note the defendant paid to plaintiffs $476, being the balance of the sum of $751, for which he had made himself liable by his guaranty. An amount in excess of the sum guaranteed was paid altogether on the first two notes, which were not, however, paid in full.

Held, on demurrer, that, in the absence of an express or implied request from the plaintiff, the defendant could not avail himself of the payment to the holders of the first note as a partial discharge of his guaranty, as it was a voluntary payment, and that the guaranty was a continuing one, and on satisfaction of the first note remained available to the plaintiffs as a guaranty of the second, to the extent to which it had not been exhausted in making good the first note.

Britton, Q. C., for demurrer.

Bethune, Q. C., contra.

COMMON PLEAS.

VACATION COURT.

Cameron, J.] [January.

CLARK V. FARRELL.

Stat. Anne, ch. 14, sec. 1—Claimant of goods seized—Non-removal from demised premises.

Held, by CAMERON J. that the statute of Anne, ch. 14, sec. 1, which provides that goods seized under execution shall not be removed from demised premises until the rent due is satisfied, applies only as between the execution creditor and the landlord, and not to persons otherwise claiming the goods, as lien holders under chattel

mortgages, against whom notice is not deemed equivalent to a distress.

Semble, also that the statute does not apply when the goods are not removed from the demised premises.

J. Crickmore, for the claimants.
J. B. Clarke, for the landlord.
Aylesworth, for the Sheriff.

IN BANCO—FEBRUARY 8.

HEADSTROM V. TORONTO CAR WHEEL COMPANY.

Contract—Action for non-acceptance—Failure to deliver goods in accordance with contract—Promissory note—Payment.

This was an action for breach of contract to accept a quantity of iron of a brand known as the "Depore," and the question was whether certain iron tendered to the defendant complied with the contract, namely—a coming within the said contract.

The Court, on the evidence set out in the case, held that it did not, being iron of a different brand called Menomine iron, and therefore the defendants were not liable.

There was also a count on a promissory note given to the plaintiffs in the course of their iron transactions; but which the court on the evidence, also set out in the case, held to have been paid, except as to $19.64, for which the plaintiff was held entitled to a verdict.

Hector Cameron, Q. C., and *Bigelow*, for the plaintiffs.
George Kerr and *Akers*, for the defendants.

FREEHOLD LOAN AND SAVINGS SOCIETY V. FARRELL.

Building societies—Note as collateral security by persons not members—Validity—Motion by plaintiff—Right of defendant to raise defence not coming within plaintiff's motion.

Held, that under C. S. U. C., ch. 53, sec. 40, and 36 Vict., ch. 104, sec. 9, D., the latter act specially relating to the plaintiffs, a Loan and Savings Society thus were empowered to take as collateral security for a mortgage given by a person not a member of the company, the promissory note of a person also not a member of the company.

In the mortgage in this case, to which the note of the defendant was given as collateral security, no interest was specified, but it was paid in advance until Feburary, 1878, but thereafter it was paid at the end of the year instead. It appeared that in Feburary, 1878, a new mortgage had been executed by this mortgagor, and handed to the company, but which they said they never accepted, as the terms upon which they agreed to accept it, namely the procuring of a new note from defendant as collateral security, had never been done, and that they held to this first mortgage and note. The learned judge at the trial found in the plaintiff's favor on this point.

Held, that the defendant was not, on a motion by the plaintiffs, to enter a verdict for them on another point, no motion having been made by him, in a position to shew that the finding of the learned judge was erroneous.

Robinson, Q. C., for the plaintiff.
Ferguson, Q. C., for the defendant.

CHAMBERLAIN V. TURNER, *et al.*

Assessment and taxes—Taxes when due—Demand.

On the 2nd of April a by-law was passed by the corporation of the City of Toronto imposing a tax rate for the year 1880, and on the same day another by-law was passed making provision for the payment of the taxes over $5.00 by instalments, and declaring that all taxes should be paid on the 4th June, 1880, but that on prompt payment of the first instalment on the said 4th June, the time would be extended for the payment of the other instalments to days named, and on such non-payment an additional charge of 5 per cent. was imposed. It was also expressly provided that nothing therein contained should affect or diminish the collector's right, when he deemed it expedient, after a proper demand made, to proceed at any time before the said several days, to collect the said taxes by distress, &c. By the statute the right to distrain was given on neglect to pay fourteen days after demand; and that such demand should be made by calling at least once at the party's residence, &c., and demanding the taxes.

The statute also provided that all taxes levied for any year should be considered to be imposed and to be due from the 1st January thereof, and end on 31st December, unless otherwise expressly provided by by-law. The tax collector, about the 20th May, left with the plaintiff, whose taxes were over $5.00, a tax bill in accordance with the above by-law, stating that the taxes were due on 4th June, but such payment could be made by instalments, &c. : and that non-punctuality wholly forfeited such right, but rendered the party's goods liable to distress on neglect to pay fourteen days after demand. After the 4th June, without any further demand, the tax collector issued his warrant to the bailiff, who distrained the plaintiff's goods on the 12th, and sold them on the 18th June.

Held, that the taxes were not due until the 4th June, and that no demand could be made until that date, and therefore the levying of the taxes before that date, even if otherwise a demand, could not be deemed to be such: and quære, whether the mere leaving of such a tax bill, even after the 4th June, could be deemed to be a demand.

Held also, that the insertion in the by-law of the discretionary power to the collector to distrain at any time was improper.

The plaintiff was therefore held entitled to recover the value of his goods sold.

McCarthy, Q. C., and *A. M. Macdonald*, for the plaintiff.

J. E. Rose and *McWilliams*, for the defendant.

COMMON LAW CHAMBERS

IN RE MURPHY V. CORNISH.

Osler J.] [Jan. 15.

Appeal to sessions by defendant—Prohibition.

Held, that the prosecutor of a complaint cannot appeal from the order of a Magistrate dismissing the complaint.

By R. S. O., ch. 74, sec. 4, the practice as to appeals is assimilated to that under 33 Vict., ch. 27, which confines the right of appeal to the defendant.

Aylesworth, for the defendant.

W. R. Mulock, for other parties.

IN RE MEAD V. CREARY.

Cameron J.] [Jan. 21.

Division Court—Garnishee—Attachment—Prohibition—Jurisdiction.

The garnishees held $500 belonging to the defendant. The plaintiff claimed the right to attach this money in a Division Court, to the extent of his judgment, amounting to $72.25.

Held, that the jurisdiction of Division Courts in garnishee proceedings is limited to debts within the proper competence of such courts to try, and a prohibition was therefore ordered.

Held, that under 43 Vict., ch. 8, secs. 10 and 14, notice of intention to dispute the jurisdiction of a Division Court is only necessary when the cause of action, being within Division Court jurisdiction, is brought in the wrong court.

Aylesworth, for plaintiff.

Roaf, for garnishees.

Mr. Dalton.] [Feb. 4.

GHENT V. MCCOLL.

Judgment debtor—Attachment—Costs.

Held, that a judgment creditor, whose judgment is for costs, cannot examine his judgment debtor under R. S. O., ch. 50, sec. 304, nor garnish debts due to him, this section requiring the judgment to be for a substantial cause of action.

A judgment creditor in such a case may examine his judgment debtor under R. S. O., ch. 49, sec. 17.

Caswell, for judgment creditor.

Henderson (Ferguson, Bain, Gordon & Shepley), for judgment debtor.

Leonard (Jones Bros. & McKenzie), for garnishee.

Mr. Dalton.] [Feb. 8.

MORGAN V. AULT.

Pleading—County Court—Abatement.

The defendant pleaded to an action in Superior Court that there was a suit pending in a County Court, brought by the plaintiff's against the defendant for the same cause of action.

Held, that the plea should aver that the cause of action in the first suit was within the jurisdiction of the County Court.

Hellmuth, for plaintiff.

Aylesworth, for defendant.

CHANCERY

Spragge C.] [Jan. 12

HAMILTON PROVIDENT AND LOAN SOCIETY V. BELL.

Principal and agent—Valuer of land—Liability of for loss.

The paid agent of a loaning Society, who professed to be skilled, and had a knowledge in the valuing of lands, was held liable to the Soci- a loss sustained by them by reason of a false report of such agent.

Silverthorne v. *Hunter*, 5 App. R., 157 distinguished.

Muir, for plaintiffs.

Spragge, C.] [Jan. 12

IRWIN V. YOUNG.

Voluntary deed—Independent advice—Costs.

Where it was shewn that a voluntary deed had been executed without independent advice, where the grantor stood in such a relation to the grantee, as that he was likely to be under his influence, the Court, [SPRAGGE C.,] owing to the peculiar relationship of the parties, set the conveyance aside, although no fraud or moral wrong could be imputed to the grantee; and although it was probable, from all the circumstances of the case, that if the contents and legal effect of the instrument had been fully explained to the grantor by an independent legal adviser, the grantor would still have executed the deed though probably with some modifications in the details. The relief was granted without costs, however, as no case of actual fraud was established, in this following *Lavin* v. *Lavin* 27 Gr. 567.

Boyd, Q.C., and *Robertson*, Q.C., for plaintiff.

Osler, Q.C., and *Lazier* for defendants.

Bruce, for infants.

Spragge C.] [Feb. 2.

BANK OF TORONTO V. IRWIN.

Re-formation of mortgage—Fraudulent conveyance.

A mortgage had been executed by defendant I. reciting that it had been agreed to be given to secure notes held by the plaintiff, and containing covenants for title, was reformed by substituting for one of the parcels inserted by mistake, which did not belong to I. another lot proved to be his at the time of creating the mortgage ; and being the only lot owned by him.

After the creation of the mortgage, M. purchased from I. the substituted lot at an absurdly inadequate price, and the sale being otherwise attended with suspicion, was set aside as fraudulent under the statute of Elizabeth.

A writ was in the hands of the sheriff at the suit of the plaintiff against I., at the time of the dismissal of a bill filed by I. to redeem the plaintiff, and at the time of the sale to M., which dismissal had under the circumstances the effect of a decree of foreclosure against I.

Held, notwithstanding, that the plaintiffs might proceed to recover their debt against I., they being in a position to reconvey the mortgaged premises.

Spragge C.] [Feb. 2.

CHAMBERLAIN V. SOVARS.

Judgment creditor—Mortgagor and mortgagee—Principal and surety.

A judgment creditor with execution in the hands of the sheriff against the lands of the defendant S., which lands were subject to a mortgage to L., whose executors were defendants in a suit to redeem. At the hearing the Court [SPRAGGE C.] declared the plaintiff entitled to the same relief as upon a bill by a *puisne* incumbrancer against a prior mortgagee and the mortgagor ; and that notwithstanding R.S.O. chap. 49, sec. 5, inasmuch as he could not establish his right in the County Court in which he had recovered his judgment, so as to obtain as effectual a remedy as that sought in the redemption suit, he might resort to equity to obtain relief.

The executors of B. were also liable upon the judgment recovered by the plaintiff, and by their answer set up that they were liable only as sureties for the defendant S. All parties interested were represented in the suit, and no one objecting thereto, a reference was granted at the instance of B.'s executors, in order that they might establish the fact of suretyship, in which case they would be entitled to the same relief as was granted in *Campbell* v. *Robinson*, 27 Gr. 634.

Spragge C.] [Feb. 2

HOLTBY v. WILKINSON.

Will, construction of—Vested remainder—Falsa demonstratio.

A testator devised certain real estate "to be owned, possessed, and inherited by my wife during her natural life subject to the further provisions of my will," followed by a devise to "W. G. when he is of the age of twenty-three years, two hundred acres, or if sold before he arrives at the years mentioned, that some other lot of land or money amounting in value to the above mentioned lot be given him in lieu thereof:"

Held, that the wife took a life estate with a vested remainder over to W. G.

Held, also, that "two hundred acres of land, the west half of lot No. 14" was *falsa demonstratio* of the west half; the testator having referred to the whole lot as being two hundred acres in a subsequent part of the will.

Blake V. C.] [Feb. 4

PIERCE v. CANAVAN.

Mortgagor and mortgagee—Purchase of part of mortgaged estate—Liability of purchasers.

B., the owner of two parcels of land (D. and E.), mortgaged them to one J., who assigned the security, after which J. obtained from B. a transfer of his equity of redemption. Shortly afterwards J. sold a portion of lot D to P., who sold and conveyed to the plaintiff who, a few days later obtained from J. a conveyance of the remainder of the lot (D); the plaintiff on each occasion paying his purchase money in full and receiving a conveyance with covenants as to title; and J. at a subsequent date sold the remaining lot (E) to one C., who sold and conveyed his interest to the defendant Canavan. The agreement throughout was that J. was to discharge the mortgage.

The Court [BLAKE V. C.] under these circumstances *held*, that the plaintiff was entitled to call upon the owners of lot E to the extent of the value thereof to indemnify him against the claim under the mortgage, that lot being liable in their hands for the full amount of the incumbrance, in the same manner and to the same extent as it had been liable in the hands of J.; in this respect following the cases of *Parker* v. *Glover*, 24 Gr. 537; *Clark* v. *Bogart*, 27 Gr. 450; *Nicholls* v. *Watson*, 23 Gr. 606; *Clarkson* v. *Scott*, 25 Gr. 373.

Blake, V. C.] [Feb. 7.

STAMMERS v. O'DONOHUE.

Specific performance—Signature of parties to contract—False statements as to state of property.

It is not necessary that the name of a party to a contract for the sale of property should be actually signed thereto; it is sufficient if the alleged contract is in writing and is subsequently recognized by one of the parties thereto in any writing signed by him or his agent. Therefore, where property was sold by auction and the contract was duly signed by the purchaser, but was not by the vendor or the auctioneer acting in the matter of the sale, and subsequently in consequence of delays on the part of the purchaser, the attorneys for the vendor, (one of whom was the vendor himself,) wrote, "Re S's purchase we would like to have it closed," and referring to certain representations made in advertisements of sale, "they were not made any part of the contract of sale. . . . Have the goodness to let us know whether the vendor will pay cash or give mortgage. If the latter, we will purchase it at once and send you draft for approval," and on a subsequent occasion, "Re S.'s purchase. Herewith please receive deed for approval," and on another occasion the vendor himself wrote, "I shall take immediate steps to enforce the contract.

Held, that there was sufficient in writing signed by the party to be charged to take the case out of the Statute of frauds; and that the purchaser was entitled to a specific performance of the agreement for sale.

Although a vendor is allowed great latitude in the statements or exaggerations he may make as to the general qualities and capabilities of lands he is about to offer for sale, still he will not be permitted to make direct misstatements and misrepresentations as to matters of fact which would naturally have the effect of inducing parties resident at a distance to bid for the property; therefore, where an advertisement of property about to be sold, was described as being "a farm of 81½ acres, twenty acres

cleared and fenced," on the faith of which the plaintiff purchased; when in fact there was not any clearing, neither was there any fencing made upon the premises. The Court [BLAKE, V. C.] in pronouncing a decree for specific performance at the instance of the purchaser, directed a reference to the master to make an allowance in respect of the matters misrepresented, and ordered the vendor to pay the costs of the suit.

Blake V. C.] [Feb. 7.

MORRIS v. MEADOWS

Mortgages—Sale of lands subject to mortgage—Right to call on purchaser to pay off mortgages.

M. sold a lot of land to C. which was subject to a mortgage for $1600, which C. agreed to pay off, this being in reality the consideration for the conveyance. C. having died his representatives sold the land to a *bona fide* purchaser who covenanted to pay off the $1600 mortgage, and default having been made in payment the mortgage premises were sold to the plaintiff who received a conveyance and therefore instituted proceedings against C's. representatives to compel payment of the mortgage debt of $1600. A demurrer for want of equity was allowed, the demand, which was a personal one, against the representatives of C. remaining with M. the original vendor.

Blake, V. C.] [Feb. 7.

FERGUSON v. FERGUSON.

Constructive trustee—Statute of limitations—Costs.

The defendant, in consideration that his father would convey to him certain lands in the township of Caledon, undertook and agreed to convey to a younger brother 100 acres of land in the township of Artemesia. The father conveyed the land to the defendant, but instead of his conveying to the brother as he had agreed, he sold the property more than twelve years before bill filed, the plaintiff being then at least twenty-one years of age.

Held, that under these circumstances the defendant was merely a constructive trustee, and that the plaintiff's right to call for a conveyance was barred by the statute of limitations; but the defendant having denied the agreement to convey, which, however, the evidence clearly established, the court [BLAKE, V. C.] on dismissing the bill, refused to give the defendant his costs.

CHANCERY CHAMBERS.

Referee,]
Proudfoot, V. C.] [Dec., 1880.

ELLIOTT v. GARDNER.

Dismissing bill for want of prosecution.

In a suit to set aside a conveyance of the equity of redemption in certain lands as fraudulent against creditors, one sitting of the Court having been lost, a defendant, the grantee of the equity of redemption, moved to dismiss the bill for want of prosecution. More than two weeks before the sittings commenced the plaintiff's solicitors were notified to file replication and proceed to a hearing, but did not do so. The excuses offered by the plaintiff were that the defendant was a material witness, and was absent prior to the hearing, and that the property had been sold under a power of sale contained in one of the mortgages, and little or no surplus remained after paying the mortgagees. It appeared that no efforts had been made to find the defendant in order to subpœna him as a witness at the hearing, and that the sale of the land did not take place until a month after the sittings at which the cause might have been heard.

Held, that the delay was not excused, and the bill should be dismissed.

Held, also, that failure of the defendant to comply with an order to produce did not under the circumstances of the case deprive him of the right to move to dismiss. *Semble* that a plaintiff cannot in answer to a motion to dismiss, ask to have the bill dismissed without costs, but must make a substantive motion for that purpose.

Langton, for defendant, (appellant.)
Hoyles, for plaintiff, (respondent.)

Spragge, C.] [Jan.

RE BENDER.

Devisee raising money on mortgage.

By his will C. B. devised to his wife "the whole of his real and personal estate upon trust, to take and receive all the rents and profits thereof, and thereout to pay all and any amounts due on the house on John street and also the one on King street, and also just debts, and to support herself and children until such time as the youngest child should attain the age of 21 years, and then to divide as directed. There were six children, the youngest of whom was four years and ten months old.

This was an application by the widow for leave to raise by way of mortgage on the King street property $13,000 at 6 or 6½ per cent. for the purpose of paying off certain existing mortgages amounting to $11,000 at 8 per cent., and with the balance putting up an addition in the rear of the building. The premises in question were leased for a term which would shortly expire. The warehouse not being large enough for lessees to transact their business, they offered, if an addition was put up in the rear of it, to renew for a term, and pay, besides rent, $100 yearly in reduction of the cost of the addition, and 10 per cent. on such cost until the same should be recouped to the estate.

It appeared that the addition would considerably increase the value of the property, as well as of the lessee's business. It also appeared that the testator had been a member of the lessees' firm, and part of his personal estate consisted of a bond from them for the testator's share of the business. It was considered that the payment of the amount of the bond would be accelerated by an extension of the lessee's business.

SPRAGGE C. granted the application.

Spragge, C.] [Jan. 31.

RE DONALD MCMILLAN

PATTERSON V. MCMILLAN.

In a partition matter before a local master under G. O. 640, the defendant, who occupied the property, claimed an absolute title by possession, under the Statute of Limitations.

The Master continued the enquiry and proceeded to take evidence.

Hoyles asked for the direction of the Court.

Symons appeared for the plaintiff.

SPRAGGE, C. directed the plaintiff to file a bill within two weeks, and parties to go to a hearing at the ensuing sittings at Cornwall, costs to be costs in the cause.

Referee.]

Proudfoot, V. C.] [January.

KNOWLTON V. KNOWLTON.

Security for costs—Nominal plaintiff—Waiver.

A petition by the defendant to reduce the amount of alimony allowed in the suit came on to be heard on the 5th Oct. Counsel for the plaintiff appeared and procured an enlargement for two weeks to answer affidavits, and the same day demanded and received copies of them. On 19th October counsel appeared and obtained a further enlargement for two weeks, but before the time expired applied for an order for security for costs on the grounds stated below.

Held, without expressing an opinion on the merits, that the plaintiff had waived her right, if any to security for costs.

Black, for petitioner.

Hoyles, contra.

MASTER'S OFFICE

The Master.] [Jan. 11.

FERGUSON AND ENGLISH & SCOTTISH INVESTMENT CO.

Costs—Mortgagor and mortgagee—42 Vict., c. 20, s. 11, (Ont).

A mortgagor is entitled under 42 Vict., c. 20, s. 11, to obtain an appointment to tax the mortgagee's costs of sale under the power in the mortgage, notwithstanding that the mortgage is executed before the passing of the act.

G. H. Watson, for mortgagor.

Davidson, for mortgagee.

REPORTS.

ONTARIO.

COUNTY COURT OF MIDDLESEX.

STEWART v. FORSYTH.

Division Court Act, 1880, Sec. 2—Jurisdiction. —Money demand—Claim ascertained and signature of defendant.

The defendant bought an article from plaintiff and signed an agreement to that effect, which concluded thus: "which I agree to take @ $100 and settle for as follows: give my note for $20, payable Jan., 1881, (and then describing three other notes amounting in all to $90) and an old machine to be taken at $20.

Held, that the claim was a money demand and that the amount of the claim was ascertained by the signature of the defendant within the meaning of the Div. Court Act, 1880, sec. 2.

[London, Jan., 1881.

This was an application for County Court costs under the following circumstances.

The plaintiff sold a reaping machine to the defendant, and the latter then signed a written order for it, concluding with the following words: "which I agree to take at $110 and settle for as follows:—

Give you my note for $20 payable Jan., 1881.
also " " $20 " " 1882.
also " " $25 " " 1883.
also " " $25 " " 1884.
and an old machine to be taken at $20.

The plaintiff had a verdict which would entitle him to County Court Costs, unless under the Division Court Act of 1880, he could have brought his action in the Division Court.

The declaration set out the sale, the agreement to give the notes, which the defendant refusal to give.

Macbeth asked for the certificate because the claim was not a money demand, and because the damages were not ascertained by the signature of the defendant, and were unliquidated.

Taylor, contra.

ELLIOT, Co. J.—The plaintiff contends that his claim in this declaration is not a debt or a money demand, but is for unliquidated damages and therefore not within the new jurisdiction conferred by the second section of the Division Court Act of 1880. If the plaintiff's claim, as set out in his declaration, is not a debt in the technical sense, I think it is certainly a money demand. The expression appears to me to be a generic term, whereby actions, which are founded in money, are distinguishable from those which sound in damages only. Thus actions for malicious prosecutions, trespass &c., are not founded originally on any money basis —money is not concerned in their inception. But if this is not a money demand what is it? The plaintiff sold a machine for $110 and has not been paid. In whatever form he may put his claim, it is a money demand.

Secondly, as to the contention that the damages are unascertained by the signature of the defendant. If it were clear that the plaintiff could not recover under the count on the special agreement the full price of the machine, but that recourse must be had to some indeterminate mode of computation, there might be more room for the plaintiff's contention. But according to Mayne on Damages the plaintiff could sue on the special agreement as the plaintiff has done, and could recover the whole price for which the notes were to be given: *Hutchinson* v. *Reed*, 3 Camp. 329. If then, the jury could give the full price of the machine under that count, the price is ascertained by the defendant's signature, and the action is clearly within the jurisdiction of the Division Court. *Mussen* v. *Price*, 4 East 147, and other cases to which the plaintiff has referred, turn upon the form of the pleadings, and do not materially bear upon the question before us, which is one of jurisdiction under a new statute.

It is clear that when the defendant refused to give the notes, the plaintiff could bring an action against him in one shape or another immediately. The only question would be in what form should the declaration be framed. Shall it be for goods sold or delivered, or on the special agreement to give the notes and the refusal? Now, if the defendant had sued in the Division Court, a technical question relating to a matter of pleading would have no weight. All that the plaintiff is required to do there is to give a reasonably clear notice of his claim. If he had sued for the price of the machine in that court, and had produced the written agreement signed by the defendant fixing the price at $110, and showed the defendant's refusal to give the notes, the judge or jury could have given $110, or some lower sum, unless the defendant could show good reason to the contrary. In *Rugg* v. *Weir*, 16 C. B. N. S., 477, the plaintiff was allowed to recover on the declaration for goods

sold and delivered in a case resembling this, and Willes J. said that even if the declaration had been deemed insufficient because it was not framed on the special agreement, he would have regarded the case as one in which an amendment would be allowed. There is ample power to amend in Division Court proceedings. And if such an amendment were permissible in the Superior Courts, surely if there should be an objection to the form of the notice of claim in the Division Court, an amendment of a similar notice would be proper there. I am not clear that there was any credit actually given is this case at all. It might well be contended that according to *Nickson* v. *Jackson*, 3 Stark. 227, and *Rugg* v. *Weir*, 16 C. B. N. S., 477, there was only an option given to the defendant to give promissory notes, which he having refused to do, the plaintiff was at liberty to sue forthwith for the price. But I do not enter into this question.

There was here a writing by which the original amount of the plaintiff's claim is ascertained by the signature of the defendant, and it appears to me that the application of the new act would be improperly restricted by allowing variations in forms of pleading to affect the jurisdiction it confers.

Certificate refused.

SECOND DIVISION COURT—DISTRICT OF MUSKOKA.

CHRISTIE, *Primary creditor*, MCLEAN, *Primary debtor*, *and* WHITESIDE, *Garnishee.*

Division Courts Act—Attachment of debts.

Sec. 14 of Div.. Courts Acts, 1880, does not refer to cases where there is a total want of jurisdiction, but to cases brought in a wrong Court.

[Bracebridge, Dec. 24, 1880.

This was an action brought by the primary creditor to recover from the primary debtor the sum of $214, balance of an unsettled account.

No notice disputing the jurisdiction had been given.

When the case came on for hearing, objection was taken that the claim was beyond the jurisdiction of the Court.

Pepler, for the primary creditor, however, contended that as the primary debtor had not given notice disputing jurisdiction, under the provisions of 42 Vict., cap. 8, sec. 14, R. S.O., this Court, by that section of the Act had jurisdiction to try the case. He cited Sinclair's Division Court Act of 1880, p. 32, note (f).

The learned judge who heard the case, held that he had no jurisdiction to try the case, and stated that he had so held in the case of *Nicholls* v. *Harston*, in Third Division Court tried at Huntsville on the 18th of August last, when a similar question as to jurisdiction was raised; but, at the request of Mr. Pepler, and in order to afford him an opportunity of furnishing him, if he could do so, with authorities in support of his contention, he postponed the giving of judgment. The following was his judgment:

LOUNT, Co. J.—I am of opinion that sect. 14 of the Act of 1880 does not refer to cases where there is a total want of jurisdiction (as when the amount sued for is beyond what could properly be adjudicated upon or the cause of action was one which could not be maintained in a Division Court), but merely to such matters as those to which section 11 of the same Act refers, that is, suits entered in the wrong court, &c. In such cases the defendant is not at liberty to object to the jurisdiction unless he has given the necessary notice to that effect. Notwithstanding the *quasi* generality of this 14th section, the wording of the latter part of it shows, in my opinion, that it was the intention of the Legislature that only in cases of the kind I have mentioned (that is, cases which might properly have been entered in some other Division Court of the same or some other county, and which had been entered in the wrong Division Court) that jurisdiction to try was intended to be given by the omission of the notice disputing such jurisdiction. The words used are, "that in default of such notice disputing the jurisdiction of such court, the same shall be considered established and determined, and all proceedings may thereafter be taken as fully and effectually as if the said suit or proceeding had been *properly commenced, entered, or taken in such court*;" the latter words show that proceedings beyond the jurisdiction of Division Courts generally, were never contemplated, because no proceedings beyond their jurisdiction could be ever *properly commenced, entered*, or *taken* in *such court*. In cases like this, where the amount sought to be recovered is beyond the jurisdiction of the court, the latter words, "*such court*," mean not Division Courts generally, but the particular Division Court.

I think there is no doubt that such is the proper construction of this section of the Act, for it never could have been the intention of the Legislature, by consent of the parties to a suit, to give jurisdiction to Division Courts to try actions specially excepted from the jurisdiction of such courts by the 53rd section of the Division Courts Act (such as ejectments, libel, slander, &c., &c.), but such would be the effect should it be held that omission to give notice disputing same, gives jurisdiction in all cases, no matter what the amount sued for or the nature of the action.

Since the hearing of this case I have consulted Chief Justice Wilson and His Honour Judge Gowan, on the question of jurisdiction raised, and I am authorized by both of these eminent judges to say that they fully concur with the view I have taken at the hearing on this point.*

It therefore is adjudged that this case be dismissed, and that the primary creditor do pay $2.40 for primary debtor's costs, and $1 for garnishee's trouble in attending this court—to be paid in fifteen days.

* The above view of the Act is in accordance with that expressed by Mr. O'Brien in his Division Court Manual, 1880, pp. 36.

LAW STUDENTS' DEPARTMENT.

An article on Legal Education by a valued contributor is unavoidably held over until next number.

The Osgoode Literary and Legal Society held on Friday evening, the 4th ult., its thirteenth public meeting in the Court of Common Pleas, the chair being taken by the Hon. Chief Justice Wilson. Mr. T. A. Gorham gave a reading entitled "A Thrilling Sketch," after which a debate took place upon the following subject: *Resolved*, "That it would be advisable to abolish the customs duties between Canada and the United States, similar tariffs being imposed upon imports from other countries, and the revenue so derived divided according to population." The affirmative was upheld by Mr. A. Stuart and Mr. W. J. Cooper, and the negative by Mr. G. G. Mills and Mr. T. H. Gilmour. In summing up the arguments the chairman congratulated the speakers on both sides on the able manner in which they had handled the subject, and for the research they had shown in the preparation of their addresses. He was of opinion that the supporters of the affirmative had proved that such a treaty would be beneficial to Canada and could be effected without causing any ill feeling between Canada and England, and consequently without injury to our commercial relations with the mother country. He therefore decided in favour of the affirmative. During the course of his remarks, the chairman impressed upon the students present the necessity for such a Society as that into which they had formed themselves. He showed them how essential it was for them to practise the art of public speaking in their youth, if they wished to rise to professional eminence in after life; and before closing he gave them some valuable practical hints as to the means by which they might improve their powers of debate. A vote of thanks was passed on behalf of the Society and tendered by the President to the Chairman, expressing their grateful appreciation of his kindness in allowing the students the use of his court room for their meeting, and consenting to take the chair. In reply, the chairman said he was only too happy to assist the Society "out of Chancery, (where meetings had previously been held,) that he took a great interest in its welfare, and had derived much pleasure from his attendance on the present occasion.

We trust that the Society is fully alive to the interest which is being manifested by the profession in its work, and, judging from the large attendance of students at the late meeting, we feel confident in asserting they do appreciate it.

The following is the result of the recent examinations for Barristers and Attorneys in order of merit:

CERTIFICATE OF FITNESS.

J. A. Allan, W. F. J. Dickson,, H. E. Crawford, N. Nesbitt, T. D. Cumberland; all without oral for merit.

J. B. McKillop, J. Doherty, C. Campbell, P. H. Drayton, W. B. Carrol, G. H. Smith, A. O'Heir, W. White, H. Buchanman, W. A. Bishop, P. Mackeown.

CALL TO THE BAR.

W. F. J. Dickson, J. A. Allan, N. Nesbett, T. D. Cumberland, P. H. Drayton, J. B. Mc-

Killop, C. Campbell, J. Doherty, G. Gibson, P. Mackeown, all without oral of merit.

J. C. L. Armstrong, J. P. Curran, J. Harley, R. Boultbee, H. Buchannan, J. A. Skinner, A. Dawson, W. A. Wilkes, D. E. Sheppard, W. White.

The following gentlemen passed the Honour examination for call:—W. F. T. Dickson, J. A. Allan, W. Nesbitt.

THE LATE CHIEF JUSTICE MOSS

The following were the remarks of Mr. Justice Burton on the opening of the Court of Appeal on the day following the news of the death of the Chief Justice of that Court:—

"My colleagues agree with me that it is not fitting to proceed with the ordinary duties of the day without some allusion to the loss the profession, the public, and especially the members of this Court, have sustained by the death of the eminent Judge who but a few short days since filled the position of President of this Court and Chief Justice of Ontario.

It is perhaps a singular coincidence that within a few weeks death has robbed this and the Mother Country of two of their most distinguished judges, both of them men in the prime of life, to whom there appeared to be opening a brilliant future, and as to each of whom, I may say, I think without exaggeration, a national loss has been sustained. Each of them, however, has left an imperishable monument of his learning and ability in the reports of their published judgments, which may well be referred to as models of judicial style.

Many of those who now hear me have listened with pleasure and admiration to the oral judgments delivered from where I am now sitting by the distinguished judge whose death we are now deploring, and must have been struck with the simplicity, ease, and grace of manner, combined with depth of thought and elegance of diction, with which those utterances were delivered; but few beyond his intimate acquaintances were aware of the untiring energy with which he investigated those cases requiring more careful preparation, or that the rising sun has occasionally found him still engaging in examining and verifying the authorities upon which he proposed to base his decisions.

His loss is too recent, and my appreciation of it too keen, to permit me to make more than a passing reference to his personal and social qualities—"To know him was to love him." My heart is too full for me to venture to say more.

We may, one and all of us, whether on the Bench, at the Bar, or the youngest student entering for the first time the portals of the profession, safely adopt him as our model, combining as he did in his own person the kind and courteous gentleman, the brilliant and able advocate, the upright and impartial judge.

I wish that I had the command of language to do justice to his many virtues and his great intellectual gifts; but I yield to none of his numerous friends in admiration of his character, and in tender and affectionate regard for his memory."

Mr. Christopher Robinson, Q.C., on behalf of the Bar, expressed the admiration and love felt for the late Chief Justice and the general regret at his untimely decease. The Chief Justice was, he said, pre-eminent in every department of public and private life, with this advantageous peculiarity, that throughout his career he had never provoked jealousy in those whom he had outstripped. All had united in regarding him as *facile princeps* among them.

At a recent convocation of the Benchers of the Law Society held at Osgoode Hall, the following resolution was adopted:—"That convocation desires to place on record the deep sense of loss which it, in common with the whole country, feels by reason of the death of the Honorable Thomas Moss, Chief Justice of Ontario, and to offer to his widow and family its respectful sympathy for them in their sad bereavement. In his death the Law Society loses one who in the years of his presence in convocation as a Bencher rendered most valuable service to the profession and to the country by the energy and wisdom which he brought to the promotion of legal education, and to whom in latter years it could ever look back for encouragement and advice. His corteous urbanity of manner and amiability of disposition won to him the hearts of those who enjoyed the privilege of his friendship, while his profound scholarship, his unimpeachable integrity, and his eminent ability, commanded universal respect and admiration. In him the province has lost one of its ablest and most distinguished sons, and one of its most erudite and brilliant judges."

CORRESPONDENCE.

Unlicensed Conveyancers.

To the Editor of the CANADA LAW JOURNAL.

SIR,—Under the head of correspondence I noticed in your journal for this month an article on "Unlicensed Conveyancers" signed "X. Y." Although I cannot altogether agree with your correspondent on the subject, with your permission I would like to express my views through your journal.

As far as my experience is concerned, I think it is as broad as it is long whether the profession get protection in this branch or not; if we don't get the conveyancing to do, we do get the suits which are occasioned by the ignorance of these "Unlicensed Conveyancers" in this branch, which more than makes up the loss for conveyancing. I may safely say that a half of the conveyancing done in our town is done by these fellows, and also that a good portion of our business is in rectifying titles which have been made bad by their blunders; a person who has once suffered by their mistakes (which are frequent), is the first to use his influence in condemning them. I don't think the profession will lose anything; rather I think, they gain by not bothering on this matter, and let those who employ these "Unlicensed Conveyancers" suffer the consequences.

Yours, &c.,
E. F.

SPRING ASSIZES, 1881.

Eastern Circuit.

MR. JUSTICE BURTON.

Pembroke.....Monday, 28th March.
Perth.....Monday, 4th April.
Ottawa.....Monday, 11th April
Cornwall.....Monday, 25th April.
L'Original.....Monday, 2nd May.

Midland Circuit.

MR. JUSTICE OSLER.

Belleville.....Monday, 21st March.
Kingston.....Monday, 4th April.
Brockville.....Monday, 11th April.
Napanee.....Monday, 18th April.
Picton.....Monday, 25th April.

Victoria Circuit.

MR. JUSTICE GALT.

Brampton.....Monday, 14th March.
Whitby.....Tuesday, 22nd March.
Peterboro'.....Tuesday, 29th March.
Lindsay.....Monday, 4th April.
Cobourg.....Monday, 11th April.

Brock Circuit.

MR. JUSTICE MORRISON.

Stratford.....Monday, 28th March.
Walkerton.....Monday, 4th April.
Goderich.....Monday, 11th April.
Woodstock.....Monday, 18th April.
Orangeville.....Monday, 25th April.
Owen Sound.....Thursday, 28th April.

Niagara Circuit

MR. JUSTICE ARMOUR.

Hamilton.....Tuesday, 15th March.
Milton.....Thursday, 24th March.
Cayuga.....Monday, 28th March.
Welland.....Thursday, 31st March.
St. Catharines.....Tuesday, 5th April.

Waterloo Circuit.

MR. JUSTICE CAMERON.

Barrie.....Tuesday, 15th March.
Guelph.....Tuesday, 29th March.
Berlin.....Monday, 11th April.
Brantford.....Monday, 18th April.
Simcoe.....Tuesday, 26th April.

Western Circuit.

MR. JUSTICE PATTERSON.

Sarnia.....Monday, 28th March.
London.....Monday, 4th April.
St. Thomas.....Monday, 18th April.
Sandwich.....Monday, 25th April.
Chatham.....Monday, 2nd May.

Home Circuit.

THE CHIEF JUSTICE OF THE C. P.

Toronto.....Tuesday, 15th March.
(Assize and Nisi Prius.)
Toronto.....Tuesday, 19th April.
(Oyer and Terminer.)

CHANCERY SPRING CIRCUITS, 1881.

The Hon. V. C. Proudfoot.

Toronto—Wednesday, April 20.

The Hon. the Chancellor.

WESTERN CIRCUIT.

Woodstock—Tuesday, March 15.
London—Monday, March 21.
Chatham—Tuesday, March 29.
Sandwich—Monday, April 4.
Sarnia—Friday, April 8.
Stratford—Thursday, April 14.
Goderich—Wednesday, April 20.
Walkerton—Tuesday, April 26.

EASTERN CIRCUIT.

The Hon. V. C. Blake.

Ottawa—Thursday, April 28.
Cornwall—Tuesday, May 3.
Brockville—Thursday, May 5.
Kingston—Monday, May 9.
Lindsay—Monday, May 16.
Peterboro'—Thursday, May 19.
Cobourg—Monday, May 23.
Belleville—Monday, May 30.

HOME CIRCUIT.

The Hon. V. C. Proudfoot.

Guelph—Monday, March 20.
Brantford—Monday, March 21.
Simcoe—Thursday, March 24.
St. Catharines—Monday, March 28.
Whitby—Thursday, March 31.
Barrie—Monday, April 4.
Owen Sound—Friday, April 8.
Hamilton.—Monday, April 12.

Law Society of Upper Canada.

OSGOODE HALL.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

Articled Clerks.

Ovid, Fasti, B. I., vv. 1-300; or,
Virgil, Æneid, B. II., vv. 1-317.
Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

Students-at-Law.

CLASSICS.

1880.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- Cicero in Catilinam, II., III., IV.
- Virgil, Eclog., I., IV., VI., VII., IX.
- Ovid, Fasti, B. I., vv. 1-300.

1881.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero in Catilinam, II., III., IV.
- Ovid, Fasti, B. I., vv, 1-300.
- Virgil, Æneid, B. I., vv. 1-304.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid, Bb. I., II., III.

ENGLISH.

A Paper on English Grammar.
Composition.
Critical Analysis of a selected Poem:—
1880.—Elegy in a Country Churchyard and the Traveller.
1881.—Lady of the Lake, with special reference to Cantos V. and VI.

HISTORY AND GEOGRAPHY.

English History from William III. to George III., inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek:—

FRENCH.

A paper on Grammar.
Translation from English into French Prose:—
1880.—Souvestre, Un Philosophe sous les Toits.
1881.—Emile de Bonnechose, Lazare Hoche.

or, NATURAL PHILOSOPHY.

Books.—Arnott's Elements of Physics, 7th edition, and Somerville's Physical Geography.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination, to be passed in the third year before the final Examination, shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery; O'Sullivan's Manual of Government in Canada; the Dominion and Ontario Statutes relating to Bills of Exchange and Promissory Notes, and Cap. 117, R. S. O., and amending Acts.

The Subjects and Books for the Second Intermediate Examination to be passed in the second year before the Final Examination, shall be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing, (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law; Underhill on Torts; Caps. 49, 95, 107, 108, and 136 of the R. S. O.

FINAL EXAMINATIONS.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Smith on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Harris's Principles of Law, and Books III. and IV. of Broom's Common Law, Lewis's Equity Pleading, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Smith on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

The Primary Examinations for Students-at-Law and Articled Clerks will begin on the Second Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

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Canada Law Journal.

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DIARY FOR MARCH.

1. Tues...Co. Ct. sitt. for York begin. Ct. of Appeal sitt. begin.
5. Sat.....Osler J. appointed.
6. Sun....Quadragesima Sunday. Name of York changed to Toronto, 1834.
11. Fri.....First London daily paper, 1702.
13. Sun.....2nd Sunday in Lent.
17. Thurs..St. Patrick's Day.
18. Fri.....Princess Louise born, 1848.
20. Sun.....3rd Sunday in Lent.
23. Wed....Sir George Arthur, Lieut.-Governor U. C., 1838.
27. Sun.....4th Sunday in Lent.
29. Mon...Canada ceded to France, 1632.
30. Wed...B. N. A. Act assented to, 1867.
31. Thurs..Lord Metcalfe, Governor-General, 1843.

TORONTO, MARCH 1st, 1881.

THE judicial and administrative officers for the new County of Dufferin are as follows :—County Judge, T. A. M. McCarthy ; Sheriff, Thomas Bowles ; Registrar, James McKim. Orangeville is the county town.

WHAT we have to expect after next August may be guessed from the opening sentence of an editorial in the *Solicitors' Journal* of Jan. 29 :—"The law as to costs under the Judicature Act appears to be, with respect to certain questions, in a most lamentable state of doubt and confusion."

SIR RICHARD COUCH, formerly Chief Justice of Bombay, and lately Chief Justice of Calcutta, has been appointed a member of the Judicial Committee of the Privy Council in succession to the Right Hon. Montague Bernard, who has resigned. We also note that Lord Gifford, one of the judges of the Scotch Court of Sessions, has resigned on account of ill-health.

WHEN the bill to abolish the Supreme Court came up for discussion, an effort was made to postpone it until Mr. Girouard's bill to limit the appellate jurisdiction of that court should come before the House.

The attempted postponement, however, proved a failure ; whereupon Mr. Mills moved the six months' hoist, which was after a rather lengthy debate carried by a vote of 88 to 39, the leaders on both sides of the house voting for the amendment.

Mr. Girouard's bill is as follows :

1. The Appellate Jurisdiction of the Supreme Court of Canada is abolished in all cases where the matter in dispute relates to property and civil rights in any of the Provinces, and generally as to matters of a merely local or private nature, and coming within the exclusive jurisdiction of the Legislature of any of the said Provinces, according to the meaning of the British North America Act of 1867 and acts amending the same.

2. This Act shall not apply to cases decided by the Exchequer Court of Canada, nor to cases where the matter in dispute affects the constitutionality or validity of any Act or Statute of any of the said Provincial Legislatures, which cases shall continue to be subject to appeal to the said Supreme Court, as now is, or hereafter shall be provided for.

The subjects prescribed by the Law Society for the primary examinations furnish food for melancholy reflection to our esteemed contemporary, the *Albany Law Journal*. We quote its comments, even at the risk that the spirit of some budding Eldon may be "sicklied o'er with the pale cast of thought" by their perusal. If our national patriotism should rebel at the idea of using Mr. Evarts' speeches in the way suggested by our contemporary, a "select sentence" of equal length

and complexity to any penned by the great American jurist might perhaps be culled from the pages of our Supreme Court Reports.

"The Legal Education Committee of the Benchers of Canada recommend that for the years 1882, 1883, 1884, and 1885, students at law and articled clerks shall be primarily examined in Xenophon, Homer, Cæsar, Cicero, Virgil, Ovid, The Deserted Village, The Task, Marmion, and Gray's Elegy. This is an eminently respectable course, but very mournful. There is something almost significantly prophetic, in these English titles, of the inevitable course of the average barrister; a deserted village, a hard task, a heroic struggle, a country churchyard. It lacks nothing but the supplement of Paradise Lost. Perhaps it was not so intended. There is nothing in the selected classics to lighten it up much. Ovid's Art of Love is not included. Why have the Benchers omitted the time-honored and generally inevitable Spectator, Course of Time and Essay on Man? We fear these Benchers have shed their intellectual kneepans. If they really want to test the pupil's efficiency, let them set him at Browning's Ring and the Book, Carlyle *passim*, Ruskin of late, or a select sentence of three pages from one of Mr. Evarts' speeches. If they can make head or tail of these they will succeed in their chosen profession."

PROTECTION V. FREE TRADE.

Our attention has been called to the advertisement of a solicitor residing in Toronto who advertises in the daily papers his willingness to do "conveyancing at one half usual charges, cash." The Discipline Committee of the Law Society will probably be called on at an early day to discuss the subject in detail. There is, however, one feature of the case which it is well to observe before going into these details.

One's feeling of disgust at seeing a professional man condescend to the tricks of those "impudent invaders," whose ignorance is their only excuse, is somewhat mitigated by the consideration that the advertiser may, in a certain sense, be acting in self-defence. Utterly objectionable as such an advertisement is, it is possible to suppose that having a keen sense of humor, he is possessed by a desire to bring forcibly before the Benchers the position of those of his brethren who are to a great extent dependent upon fees derived from conveyancing for a living. We are not prepared to say that the Law Society has, as a body, any right to bring the delinquent to book, inasmuch as its government has never made any effort to prevent the evil which this person may now, in a miserable, short-sighted way, we admit, be endeavoring to protect himself against. It is not, of course, a matter of any moment to the "eminent counsel" and leaders of the Bar, who in the main compose that body, whether the conveyancing business of the country passes into the hands of ignorant quacks or not. It cannot be supposed for a moment that an explanation of this remissness is to be found in the fact that the untying of the knots produced by the practice of these unlicensed gentry affords profitable employment to our legal magnates in their chambers and in Court, for a more highminded body of gentlemen individually, it would be impossible to find in any country; but neither has it occurred to them, apparently, that they are placed there to protect, or at least to endeavour to protect, the interests of others in a matter which is to the latter a question of vital interest.

We have so far alluded to a difficulty which we are sure will present itself to many, should this advertisement be brought before the committee, on the supposition that it was intended as a means of meeting the attack of the class referred to; if, however, the intention of the advertiser was to attract clients to his own office at the expense of his brethren in the profession, we can only say that he is unworthy of being ranked amongst those who as a class, both at the Bar and on the Bench, have earned an honorable reputation, and fostered a spirit of respect for, and obedience to the laws, without which no country can eventually prosper.

A large field of inquiry is opened up by even a cursory glance at the subjects and interests involved, too large, however, for present discussion. It is one, however, that must be taken up some day by those whose duty it is, and we can assure them that it is of interest to so many as to require careful and full consideration at an early day. We at least have endeavoured to do our duty in the matter, and shall so continue.*

DIGESTS AND DIGEST-MAKING.

This subject is pleasurably brought to our notice by the fact that the long expected and much-sighed-for Digest of Ontario Reports has at length made its appearance in the shape of two portly volumes, wherein are classified and epitomized all the reported decisions of the Superior Courts of law and equity in this Province from their foundation up to the present time.

Before, however, making any more detailed reference to the special features of the new Digest, it may not be without interest to notice briefly its predecessors in the same field, so far as this Province is concerned. The first of these was published in 1840 by the late Mr. John Hillyard Cameron. Many of the cases contained in this work had not previously appeared in print, as the regular series of Queen's Bench Reports did not commence till some years later. Up to that time printed reports were few and far between, a state of things which the practitioner of to-day will perhaps find it difficult to realize. In 1852 appeared Robinson and Harrison's Digest, which taking for its starting-point the commencement of Taylor's Reports in 1823, brought the cases up to the end of vol. 7 U. C. Reports. This compilation was mainly due to the industry of that indefatigable worker, the late Chief Justice Harrison, then a student in the office of Mr. (now Sir James) Lukin Robinson, under whose supervision it was prepared.

Next in order comes Harrison and O'Brien's Digest, which was published in 1863, and included over 3000 cases contained in 35 volumes of reports which had appeared since the publication of its predecessor. The preparation of this work was entrusted entirely to Mr. Henry O'Brien, Mr. Harrison's time being then fully occupied with the many things his busy hands found him to do. It was necessarily a much larger volume, and therefore involved more labor than its predecessor, and what we say is of general application, for any one who has had anything to do with digest-making knows how much each additional case adds to the difficulty of the work, often leading to an entire re-arrangement of one or more headings, or further subdivisions or classifications.

But meritorious and indispensable as these compilations undoubtedly were in their day, they are now completely superseded by the work that lies before us, a necessary result of that *saeva necessitas*, which sooner or later consigns all digests, when their usefulness is gone, to an honorable and rarely disturbed retirement on the top shelves of legal libraries.

The general plan adopted by the editors is the same as that of Fisher's Digest of the English Reports. That splendid monument of legal industry is itself, as is well known, founded on the Analytical Digest of the late Hon. Samuel Bealey Harrison, formerly judge of the county of York in this Province. Not the least of the claims which that most estimable and accomplished man has on the grateful remembrance of his professional brethren, alike of the English and the Ontario Bar, is that he was the first author of a thoroughly good Digest, which was not only best in his own day, but the direct ancestor of the best in ours. Had there been no "Harrison," there would have been no "Fisher," and worse still

* After the above article was in type, we received the *resume* of the proceedings of the Benchers for last Term, from which it appears that a committee has been appointed to consider this question. We are sure that the profession at large will heartily welcome this evidence of awakening interest in a matter of such vital importance.—[EDS. L. J.]

to an Ontario lawyer at least, no "Robinson and Joseph." The principles on which these Digests have been constructed, and on which it is safe to say that all good Digests to the end of time will be constructed, can nowhere be found more clearly laid down than in the opening words of the preface to the first edition of Mr. Harrison's work, which was published in 1836. The passage will bear quotation, and we therefore reproduce it:—"The considerations to be attended to in the construction of a work like the present are;—that it should be a faithful and correct epitome of the several cases of which it purports to give the substance; that it should contain *all the cases* determined within the period of time which it professes to embrace; that the period at which it commences should be judiciously determined upon; and that the arrangement should include both the analysis of science and the technicality of practical habit, so as to suit with equal readiness every branch of a profession which has almost every grade of intellectual acquirement."

Applying these theoretical tests, thus clearly enunciated, to the work under review, we think it will be found in a very marked degree to satisfy their requirements—the grand, crucial test of the practical experience of the profession has been constantly applied to it for several years back, and we have yet to hear of one amongst the many who have used it, whatever his "grade of intellectual acquirement," who has complained that it did not assist his inquiries, or that it gave them a wrong direction.

The starting point is the best possible—the commencement of the Reports, and the cases have been collected, as the preface informs us, from 125 volumes of Reports, and some twenty volumes of the LAW JOURNAL, with references to various Statutes discussed in the cases digested. When, in addition to these facts, we mention that the completed work, including the addenda, contains over 4,400 double-column pages, and about 14,000 cases, many of which are cited four or five times over or even more frequently in connection with different heads of Law, some idea may be formed of the enormous amount of labor involved in the compilation of this Digest, and of the patient, untiring energy which could alone have enabled the editors to grapple with the difficulties of their task, and bring it to a successful issue. The care of the editors has included all decided cases, not even excluding those, which though obsolete as to their main scope and effect, may still be useful for purposes of reference or comparison; the substance of the cases is in general correctly and succinctly given; and, in connection with this feature of the work, we may say that scissors and paste are by no means the only agencies which have been employed upon the head-notes, which have been in many cases remodelled and shortened. The labor of this alone has been immense, and to it the senior editor himself applied his great experience as a reporter, his thorough knowledge of the cases, and the resources of a mind peculiarly accurate and logical in thought and clear in expression. The necessity for this revision will be evident to any one who critically examines some of the head-notes of the cases in the earlier reports.

But it is not only in these particulars that the work is admirable; the excellent arrangement of the cases is that which most strongly impresses the reader. To borrow the apt words which we have already quoted, it seems to satisfy the demands alike of the "analysis of science and the technicality of practical habit." The man of well trained and logical mind, who can grasp the main idea involved in some legal point and divest it of its accidents, will find that his correct habits of thought facilitate his search of cases, which will generally be found ranged under the titles most appropriate to their real substance. But those whose logical powers may have grown rusty, or never taken on a very fine edge, will find their mental infirmities greatly assisted by the system

of cross-references which has been adopted in this work. Thus, he who in quest of authorities resorts to titles expressive of what is formal, or accidental, or of secondary importance in the subject-matter of his inquiries, will find that the editors have anticipated such intellectual deficiencies on the part of their weaker brethren, and provided an adequate remedy therefor by a reference to the proper title. In this connection, mention should be made of the analytical table of contents which is prefixed to every important title, by means of which a sort of bird's-eye view is obtained of the whole law bearing upon the subject. The advantages of this arrangement are so great and so obvious, and are so fully exemplified in the works of Harrison and Fisher already referred to, that we must confess our surprise that the editor of so recent and important a Digest as that of the English Law Reports has completely neglected to avail himself of it. And here we may remark that of all the bad legal work we know, nothing has exceeded the badness of the digests to the Law Reports. If, for example, the title "Contract" in the last-named publications is referred to, the inquirer will find that no attempt has been made to classify the cases according to the various topics and relations connected with contracts, but must content himself with ranging over a myriad of sub-heads, whose only connection with each other is an alphabetical one. The alphabetical system must necessarily be adopted in arranging the titles of a Digest or an Index, but the attempt to carry out that system in the details of each particular title is one which we should have expected to originate in a Chinese rather than in an English intellect.

If, on the other hand, this title or any other important one is referred to in "Robinson and Joseph," the reader finds what may be called an analytical sub-digest of the head of Law in question, occupying in some cases two, three or four columns, in which the leading topics are arranged in their natural order and displayed in capital letters, so as to catch the eye at once, while the minor divisions coming under each of these topics with their sub-heads, if any, are indicated by the use of italic type, indented lines and numeral and literal references. The result is that case-hunting in this Digest is relieved in great measure from the irksomeness and uncertainty which many associate with that not too fascinating pursuit. It will, we think, occur to many that the analysis of the authors is so correct and exhaustive that it might well be applied to serve a purpose quite unconnected with its primary design, and that the young student or practitioner at all events might derive material benefit from perusing the cases in connection with such analysis almost in the same way as he would a treatise.

It is no part of our design in this article, nor have we the requisite space, to enter into any criticism of the details of this work. It seems, moreover, almost superfluous to single out any particular titles for comment, when the treatment of all is so similar in its principle and so uniform in its success. Reference may, however, be made to the titles, Evidence, Mortgage, Railways, and Municipal Corporations, as models of lucid arrangement and accurate analysis. In the preparation of the last-mentioned title, Mr. Joseph probably derived great benefit from the experience acquired in the preparation of his excellent edition of the late Chief Justice Harrison's Municipal Manual. Municipal law, as administered in Ontario, is of such vast and constantly increasing importance, and its distinctive peculiarities are so marked, that we think the authors deserve special credit for the world of pains they have evidently taken in the collection and arrangement of the cases bearing on this difficult subject.

We must not omit to mention the references to Statutes, and concise summaries of their effect, which are introduced here and there throughout the work—they are so good and useful that one is tempted to wish there were more of them. Nor will the possessor of this work fail to

note with interest the lists prefixed to the first volume, where are found, in the order of their appointment, the names of those distinguished men whose *dicta*, in a highly concentrated form it is true, constitute the subject-matter of all that follows. The reporters also, past and present, if they should feel aggrieved by the liberties taken with some favorite head-note, may find consolation in the fact that their names also appear in such excellent company as that of the Ministers of Justice, and Attorneys-General, both of Ontario and of the Dominion. The dates of appointment appear in connection with the names in each case, and the whole forms an appropriate and suggestive memorial of the men whose labors in their respective spheres form the foundation of the Digest, and could alone have rendered such a work possible.

It is not necessary for us to refer at length to the peculiar qualifications of the editors for the work which has engaged their energies during the past six years. The reputation of the chief editor of the Ontario Reports cannot be increased by anything we might say, and his coadjutor, Mr. F. J. Joseph, has long been known to the profession as an experienced aud successful worker in various departments of legal literature. We once more felicitate the editors and our readers on the fact, that this most important work is "done," and "well done," if not altogether "done quickly," and will conclude by expressing a hope that the same hands which have laid the foundation so well, may also raise the superstructure by the issue of supplementary Digests hereafter at suitable intervals.

We must not omit to say a word as to the way in which printer and publisher have done their part -very important considerations, especially in the case of a work which will be so constantly in the hands of the profession. It will be sufficient to say that in our opinion the new Ontario Digest will compare most favorably in its general appearance and in all its typographical details with any work of the kind, American or English; a fact which reflects the greatest credit on the publishers, Messrs. Rowsell & Hutchison. In its outer form, as in its inner substance, it is very similar to the work of Fisher, which has probably served as a model in the one respect as well as the other; it must be a source of gratification to every professional man in the Province that Canada at length possesses a Digest which is in every way worthy to take its place on his shelves side by side with its transatlantic prototype.

LAW SOCIETY.

HILARY TERM, 44TH VICTORIÆ.

The following is the *Resumé* of the proceedings of the Benchers during this Term, published by authority:

MONDAY, Feb. 7th, 1881.

Present,—Messrs. Read, Crickmore, Maclennan, Benson, McMichael, Richards, Bethune, Osler, and Irving.

Mr. Maclennan was appointed chairman in the absence of the Treasurer.

The minutes of last meeting were read and approved.

The reports of the Examiners and Secretary on the examinations for Call to the Bar were read, and ordered to be considered on Tuesday, February 8th.

The reports of the Examiners and Secretary on the examinations for Certificate of Fitness and on the papers and service of the candidates, were received and read.

Ordered, that Messrs. Allan, Dickson, Nesbitt, Cumberland, Doherty, Campbell, Carroll, O'Heir, White, Buchanan, Bishop, and Mulkern, be granted Certificates of Fitness forthwith, and that Messrs. Crawford, McKillop, Drayton, and Smith do receive their certificates on the completion of their papers to the satisfaction of the Secretary.

The reports of the Examiners and Secretary on the Intermediate Examinations were received and read.

Ordered, that the following gentlemen be allowed their first intermediate examination as students and articled clerks, namely:—

Messrs. Short, Lilly, Martin, Clark, Mahaffey, Haultain, Kappelle, Sweet, Wallace, McKay, Ponton, Godfrey, Dickson, Danks, Hanna, Anderson, Porteous, Lee, Tyrrell,

Barber, McCrae, Parker, McMillan, Witherspoon, Livingston, Ball, Lees, Gordon, Code, and Dunbar.

Ordered, that the following gentlemen be allowed their second intermediate examination as students and articled clerks, namely:—

Messrs. Stuart, Oliver, Plaxton, Kitson, Creswicke, Gorham, McVittie, Geddes, Staunton, Stinson, Thompson, Binckley, Lee, Donahue, Robinson, Boun, Coffee, Keys, Cassidy, Fuller, Jelfs, McDougall, Weir, Dancey, Hewson, Wallace, Switzer, Ashton, Parkes, Meyers, Thompson, McMichael, Reddick, and Williams.

The reports of the Examiners on the Honor Examinations were read.

Ordered, that these reports be referred to a committee composed of Messrs. Crickmore, Benson, Ferguson, Leith, Hoskin, Robertson, Smith, and Maclennan, for examination and report.

The report of the Examiners on the examinations for call with honors, was read and referred to the same committee for examination and report.

The report of the Finance Committee, accompanied by the balance sheet for 1880, and the estimates for 1881, was read and ordered for consideration on the 8th inst.

The further report of the Finance Committee on the increased consumption of water, recommending that apparatus be provided for the purpose of utilising the condensed steam; also on the application of Mr. Lowe and Mr. Inglis for the return of certain fees was received and read.

Ordered for immediate consideration, and adopted.

The secretary laid before Convocation lists of persons who have, and also who have not up to the present time taken out certificates to practice for the year 1881, pursuant to order of Michaelmas Term, 1879.

Moved by Mr. Irving, seconded by Mr. Crickmore, That the solicitor be required to make on Saturday next a return to Convocation of the action which he has taken in reference to certificates not taken out for the present year, according to the list given to him by the Secretary this day.

Carried.

Mr. Irving gave notice for Saturday, 12th instant, that he would move a rule that an annual return shall be made by the solicitor on the first Saturday of Hilary Term of all attorneys who shall have neglected to pay their annual fees up to the last day of the vacation, after the Michaelmas Term preceeding; and that on said day a return shall be laid before convocation of attorneys who are in arrears for previous years.

Attention having been called to the lamented death of Chief Justice Moss, Mr. Read, Q. C. moved, and Mr. Benson, Q. C. seconded the following resolution:

"That Convocation desires to place on record the deep sense of loss which it, in common with the whole country, feels by reason of the death of the Honorable Thomas Moss, Chief Justice of Ontario, and to offer to his widow and family its respectful sympathy for them in their sad bereavement.

In his death the Law Society loses one, who, in the years of his presence in Convocation as a Bencher, rendered most valuable service to the profession and the country by the energy and wisdom which he brought to the promotion of legal education, and to whom in later years it could ever look for encouragement and advice. His courteous urbanity of manner, and amiability of disposition, won to him the hearts of those who enjoyed the privilege of his friendship, while his profound scholarship, his unimpeachable integrity, and his eminent ability, commanded universal respect and admiration.

In him the Province has lost one of its ablest and most distinguished sons, and one of its most erudite and brilliant judges." Carried.

Moved by Mr. Crickmore, seconded by Dr. McMichael,—

That a copy of the foregoing resolution be engrossed and sent by the Secretary to Mrs. Moss.

TUESDAY, Feb. 8th, 1881.

Present—Messrs. Crickmore, Irving, Moss, Benson, Mackelcan, Maclennan, Read, Meredith, Richards, McMichael, Martin.

Mr. Maclennan was appointed Chairman, in the absence of the Treasurer.

The minutes of last meeting were read and approved.

The Reports of the Examiners and Secretary, on the examinations for Call, and the papers of the candidates were read.

Ordered, that Messrs. Allan, Nesbitt, Cumberland, Drayton, McKillop, Campbell, Doherty, Armstrong, Curran, Boultbee, Buchanan, Skinner, and Sheppard be called to the Bar forthwith, and that Messrs. Dickson, Dawson, Mulkern, Gibson, White, Harley and Wilkes be called when their papers are completed. Messrs. Allan, Nesbitt, Cumber-

and, Drayton, Campbell, Doherty, Armstrong, Curran and Sheppard were called to the Bar accordingly.

The Report of the Legal Education Committee on the Primary Examinations was received and read as follows:

Hilary Term, 1881.

The Legal Education Committee beg leave to report that the following gentlemen are to be entered on the books as Students-at-Law.

GRADUATES.

Henry Gordon Mackenzie.

MATRICULANTS OF UNIVERSITIES.

James M. Knowlson, Edwin M. Henry, E. W. Boyd, W. A. Campbell, A. L. Randle, Frederick Laing Frazer.

JUNIOR CLASS.

James F. Williamson, John Thacker, E. W. H. Vanallen, R. G. Code, W. R. Smythe, W. N. Irwin, E. H. Ambrose, G. E. Martin, J. S. Meek, A. McKechnie, W. H. Tweedale, T. F. Johnson, S. C. Mewburn, G. H. Esten, W. L. Lesslie.

The following gentlemen were passed for articled clerks:

A. W. Benjamin, Matriculant of Victoria College; J. Hambly, J. J. Berry.

(Signed)

JOHN CRICKMORE,
Chairman.

8th February, 1881.

The report of the Legal Education Committee on the case of D. F. McWatt was received and read. Ordered that no action be taken.

The petition of J. Gordon Jones, an English barrister, was referred to a Committee consisting of Messrs. Crickmore, Mackelcan, and Meredith, with instructions to report forthwith.

The Committee reported that Mr. Jones was entitled to be called to the Bar.

Ordered accordingly.

A letter from Mr. E. J. Hooper was referred to Finance Committee with power to act.

The consideration of the report of the Finance Committee, Balance Sheet and Estimates, ordered for to-day, was adjourned to Saturday, 12th instant.

Messrs. Dawson, White, Dickson, Wilkes, Boultbee, Gibson and Jones were called to the Bar.

The Consolidated Rules of the Society were read a second time, and ordered for a third reading on Saturday next, when printed in book form.

Mr. Mackelcan gave the following notice of motion for Saturday, the 12th instant:—

That in view of the largely increased cost of the Supreme Court reports amounting to $5,000 a year, he would move on Saturday, the 12th Feb., the adoption of a rule repealing the existing rule for the purchase of these reports, and providing that a sufficient number only be purchased for the Library, for the Judges of the Court of Appeal, and Superior Courts, and the Judges' Library, the Judges of the County Courts and the County Libraries receiving aid from the Law Society.

SATURDAY, Feb. 12th.

Present—Messrs. Irving, Crickmore, Moss, Hoskin, Mackelcan, Maclennan, Read, and Bethune.

Mr. Maclennan was appointed Chairman.

The minutes of last meeting were read and approved.

The Special Committee to which was referred the consideration of the Honor Examinations in connection with the Intermediate Examinations reported:

That the following gentlemen had passed their first Intermediate Examination with honors, namely, Messrs. T. C. Short, Joseph Martin, G. Kappelle, E. Sweet, F. G. Lillie, A. S. Clark, F. W. A. G. Haultain.

That the following gentlemen are entitled to scholarships, namely:

Mr. T. C. Short, to the first scholarship.
" Jos. Martin, " second "
" G. Kappelle, " third "

That the following gentlemen had passed their Second Intermediate Examination with honors, namely:

Messrs. C. W. Oliver, C. W. Plaxton, T. A. Gorham, A. Stuart, A. E. H. Creswicke, W. A. Geddes, and E. E. Kittson.

That the following gentlemen were entitled to scholarships, namely:

Mr. C. W. Oliver, to the first scholarship.
" C. W. Plaxton, " second "
" T. A. Gorham, " third "

The same Committee reports on the examination for call with honors as follows:

That the following gentlemen had passed with honours, namely,—

1st, Mr. W. J. T. Dickson; 2nd, Mr. J. A. Allan; 3rd, Mr. W. Nesbitt; and were entitled to medals as follows:

Mr. Dickson, to a gold medal; Mr. Allan, to a bronze medal; Mr. Nesbitt, to a bronze medal.

Mr Hoskin presented the report of the Discipline Committee, on the case of Mr. D. W. Dumble, which was adopted.

Mr. Hoskin reported a Draft Bill, to define the disciplinary powers of Convocation.

Ordered, that the Discipline Committee communicate with the Attorney-General, with a view to obtaining any legislation that may be necessary.

Letters received from Messrs. Campbell and Wilson relative to fees, were read.

A letter from Mr. Becher, relative to the Call of Ontario Barristers to the English Bar, was read.

Ordered, that it be acknowledged.

The Report of the Finance Committee, on the Balance Sheet for 1880, and the estimates for 1881 was adopted.

On motion made,

Resolved that the quorum of the Building Committee appointed by Convocation on 29th June, 1880, be five, and that the Committee have power to elect their own chairman from time to time.

Mr. Moss moved, seconded by Mr. Hoskin,

That Mr. Read and Mr. Crickmore be appointed to act with the Treasurer as Scrutineers at the next election of Benchers, and that Mr. Maclennan act as and for the Treasurer in case he should be absent during the meetings of Scrutineers to count the votes, and that each of the Scrutineers be paid the sum of twenty dollars for each day's attendance.—Carried.

Mr. Mackelcan moved pursuant to notice:

That, in view of the largely increased cost of the Supreme Court Reports amounting to $5,000 a year, the existing rule for the purchase of these Reports be repealed, and that in lieu thereof a rule be adopted providing that a sufficient number only be purchased for the library of the Judges of the Court of Appeal and Superior Courts, for the Judges' libraries, the Judges of the County Courts and the County Libraries receiving aid from the Law Society.—Lost.

For the motion,—Messrs. Mackelcan, Crickmore, and McMichael.

Against the motion,—Messrs. Hoskin, Moss, Bethune, and the Chairman.

Mr. Moss gave notice that he would on Friday, the 18th February, move a resolution with reference to the practice of conveyancing by uncertificated persons.

Attention having been called to the absence during three consecutive terms from Convotion of Mr. W. H. Scott and Mr. John Bell,

Ordered, that their seats as Benchers be declared vacated.

The report of the Solicitor as to defaulters was received.

Mr. Ellis was appointed Auditor for 1881, at the same salary as during 1880.

The Consolidated Rules were read a third time and adopted.

FRIDAY, Feb. 18th, 1881.

Present—Messrs. Maclennan, Crickmore, Benson, Ferguson, Kerr, Moss, Irving, Hoskin, Britton, Richards, Bethune.

Mr. Maclennan was appointed Chairman in the absence of the Treasurer.

The minutes of last meeting were read and approved.

Mr. Crickmore presented report of the Legal Education Committee on proposed changes in the curriculum.

Ordered to be considered on first Saturday of next term.

Mr. McKillop, Mr. Buchanan, Mr. Skinner, and Mr. Harley were called to the Bar.

A petition from Mr. C. J. Fuller was received and referred to Finance Committee with power to act.

A letter was received from Mr. Joseph respecting the publication of the triennial digest.

Ordered that Mr. Joseph be informed that Convocation will hear any objections to the present plan for a digest to be submitted in writing by himself and Mr. Robinson.

Mr. Kerr presented the Report of the County Libraries Aid Committee which was received, ordered for immediate consideration, and adopted.

The Chairman of the Reporting Committee laid before Convocation the Returns sent in by the Reporters of the several Courts.

A second letter from Mr. Becher on the subject of Call to the English Bar was ordered to be acknowledged.

Mr. Moss moved, seconded by Mr. Britton,—

That Messrs. Hoskin, Benson, Smith, Bethune, and the mover and seconder be a Committee to consider some means of putting an end to the performance of conveyancers' work by uncertificated or unlicensed persons.—Carried.

Convocation adjourned.

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT.

February 1881.

THE QUEEN, *Appellant*, v. BELLEAU, ET AL., *Respondents.*

North Shore Quebec Turnpike Bonds issued under authority of 16 Vict. c. 235—Liability of Canada for the debts of the late Province of Canada.

The Respondents by Petition of Right before the Exchequer Court set forth in substance: That the Province of Canada had raised, by way of loan, a sum of £30,000 for the improvement of Provincial highways situate on the North Shore of the River St. Lawrence, in the neighbourhood of the City of Quebec—and a further sum of £40,000 for the improvement of like highways on the South Shore of the River St. Lawrence—that there were issued debentures for both of the said loans, signed by the Quebec Turnpike Road Trustees, under the authority of an Act of Parliament of the Province of Canada, passed in the sixteenth year of Her Majesty's reign, intituled: "An Act to authorise the Trustees of the Quebec Turnpike Roads to issue debentures to a certain amount and to place certain roads under their control"—that the moneys so borrowed came into the hands of Her Majesty, and were expended in the improvement of the highways in the said Act mentioned—that no tolls or rates were ever imposed or levied on the persons passing over the roads improved by means of the said loan of £30,000—that the tolls imposed and collected on the highways improved by means of the said loan of £40,000 were never applied to the payment of the debentures issued for the said last mentioned loan in interest or principal—that the Trustees accounted to Her Majesty, as well for the said loans as for the tolls collected by them—that at no time had there been a fund in the hands of the said Trustees adequate to the payment, in interest and principal, of the debentures issued for said loans—that the Respondents are holders of debentures for both of the said loans to an amount of $70,072, upon which interest is due from the 1st day of July, 1872—that the debentures so held by them fell due after the Union, and that Her Majesty is liable for the same under sec. 111 of British North America Act, 1867, as debts of the late Province of Canada existing at the Union.

In his defence to this Petition, Her Majesty's Attorney-General did not deny the liability of Her Majesty for the debts of the late Province of Canada, but he denied that the debentures in question were debentures of the Province of Canada—that the moneys for which they were issued were borrowed and received by Her Majesty—that there was any undertaking or obligation on the Province of Canada to pay the whole or any part of the said debentures.

Held, affirming the judgment of Exchequer Court, that the debentures in question were debentures of the late Province of Canada—therefore under the provisions of the British North America Act, the Dominion of Canada was liable, but for the capital only of the said debentures, it being provided by c. 235, sec. 7, that no money should be advanced out of the Provincial funds for the payment of the interest.

RITCHIE, C. J., and GWYNNE, J., dissented.

Lash, Q. C., and *Church*, Q. C., for appellants.

McCarthy, Q. C., and *Irvine*, Q. C., for respondents.

JONAS, *Appellant*, v. GILBERT, *Respondent.*

By-law—Power to impose license tax—Discrimination between residents and non-residents—Ultra vires of 33 Vict., c. 4, N. B.

This was an action against the Police Magistrate of the city of St. John, for wrongfully causing the plaintiff (Jonas), a commercial traveller, to be arrested and imprisoned on a warrant issued on a conviction by the Police Magistrate for violation of a by-law made by the Common Council of the city of St. John, under an alleged authority conferred on that body by 33 Vict., c. 4, passed by the Legislature of New Brunswick. The by-law in question authorized "the Mayor or his Deputy, as aforesaid, to demand and receive from any and every such person to whom license shall be granted, as aforesaid, for the use of the Mayor, Aldermen and Commonalty of the said City, the sum of money hereinafter men-

tioned and specified, according to the following scale, namely:—

Professional men, as Barristers, Attorneys, Notaries, Physicians, Surgeons, Practitioners in Medicine or any art of healing, Dentists, if resident, twenty dollars, $20. If transient persons, not having taken up a residence, forty dollars, $40.

Wholesale or retail Merchants or Dealers or Traders, Forwarding or Commission Merchants, Lumber Merchants or Dealers, the Agents of merchants or traders, Express Agents, General Brokers, Manufacturers,, Apothecaries, Chemists and Druggists, if resident, twenty dollars, $20. If transient persons, not having taken up a resident, forty dollars, $40.

Persons not having their principal place of business in this City, selling, or offering for sale, goods, wares, and merchandise of any description by sample card, or any other specimen, and the agents of all such persons, forty dollars, $40.

Persons using any art, trade, mystery or occupation, or engaged in any profession, business or employment within the city, not coming under any of the before-mentioned, if resident, twenty dollars, $20. If transient persons, not having taken up a residence, forty dollars, $40.

Held, that assuming the Act 33 Vict., c. 4 to be *intra vires* of the Legislature of New Brunswick, the by-law made under it was invalid, because the act in question gave no power to the Common Council of St. John, of discrimination between residents and non-residents such as they had exercised in this by-law.

Bethune, Q. C. and *Maclaren*, for appellants: *Tuck*, Q. C., for respondent.

DEWE, *Appellant*, v. WATERBURY, *Respondent*.

Slander—Public officer—Privileged communication.

The appellant having been appointed Chief Post Office Inspector for Canada, was engaged under directions from the Post Master General in making enquiries into certain irregularities which had been discovered at the St. John post office. After making inquiries, he had a conversation with the respondent alone in a room in the post-office, charging him with abstracting missing letters, which respondent strongly denied. Thereupon the Assistant Postmaster was called in and the appellant said: "I have charged Mr. W. with abstracting the letters. I have charged Mr. W. with the abstractions that have occurred from those money letters, and I have concluded to suspend him." The respondent having brought an action for slander, was allowed to give evidence of the conversation between himself and appellant. There was no other evidence of malice. The jury found that appellant was not actuated by ill-feeling toward the respondent in making the observation to him, but found that he was so actuated in the communication he made to the Assistant Postmaster.

Leave being reserved to enter a non-suit or verdict for the defendant, the verdict was for the plaintiff, and the jury assessed the damages at $6,000.

Held, on appeal, that the appellant was in the due discharge of his duty and acting in accordance with his instructions, and that the words addressed to the Assistant Postmaster were privileged.

Lash, Q.C., for appellant.

Tuck, Q.C., for respondent.

GALLAGHER, *Appellant*, v. TAYLOR, *Respondent*.

Marine policy—Total loss—Sale by master—Notice of abandonment.

This was an action brought by the respondent against the appellant to recover as for a total loss, the amount insured by the appellant, as one of the underwriters, upon a marine policy issued by the Ocean Marine Insurance Association of Halifax, upon the shallop "Susan," belonging to the respondent, alleged to have been totally lost by a peril insured against. The vessel stranded on the 6th July near Port George, in the County of Antigonish, adjoining the County of Guysboro', where the owner resided. The master employed surveyors, and on their recommendation, confirmed by the judgment of the master, she was advertised for sale on the 7th July, and sold on the 11th July. The captain had telegraphed to the agents of the vessel in Halifax, who informed defendant's company, but he did not give any notice of abandonment, and did not endeavor to get off the vessel.

The vessel, valued at $1,200, insured for $800, was sold for about $105 on the 11th July, and was immediately got off, and afterwards used in trading and carrying passengers.

Held, that the sale by the master was not justifiable, and that the loss was not such a loss as to dispense with notice of abandonment in claiming for a total loss.

Rigby, Q. C., for appellant.

Gormully and *Graham*, for respondent.

ELECTION APPEAL.

CIMON, *Appellant*, v. PERRAULT, *Respondent.*

Colorable employment by agent—Acts of sub-agent—Public peace.

The charge upon which this appeal was decided was one of bribery by Pamphile Allard and Joseph Israel Tarte, agents of the respondent, by payments of money to A. Bouchard, Samuel Boivin, Israel Gagnon and Jean Gagnon, all of whom were electors. By the evidence it was shown that Tarte was the respondent's general agent for that part of the country, and that Allard was specially requested and given money by Tarte, and induced by him to advance money to employ a certain number of men without specifying any particular persons to be so employed, for the alleged purpose of preserving the public peace on polling day. It was not in evidence that Tarte had applied to the proper authorities or otherwise complied with the law in order to secure the peaceful conduct of the election, but the reason assigned by him for ordering the employment of policemen was that he had received information by telegrams and letters that roughs were coming down from Quebec to Bay St. Paul to interfere with the voting of the electors. No person came, and the polling took place without any interference. The above named four persons were known to be supporters of the appellant, and swore that they voted for respondent because they received from Allard each the sum of two dollars.

Held, (TASCHEREAU & GWYNNE, JJ. dissenting)—(1) That the respondent was responsible for the acts of bribery committed by Allard, a sub-agent appointed by his general agent. (2), That the employment of a number of men to act as policemen on polling day by direction of Tarte, without his having previously taken the means provided by law to secure the public peace, was a colorable employment, and therefore respondent, through his agent, Tarte, was guilty of a corrupt practice.

Davidson, Q. C. for appellant.

Angers, Q. C., and *Pelletier*, Q.C., for respondent.

ELECTION APPEAL.

LARUE, *Appellant* v. DESLAURIERS, *Respondent.*

Sup. Court Act, sec. 4—Right to send back record for further adjudication—Corruption—Insufficiency of return of election expenses—Personal expenses of candidate to be included.

The original petition came before Mr. Justice McCord for trial, and was tried by him on the merits subject to an objection to his jurisdiction. The learned judge having taken the case *en delibere* arrived at the conclusion that he had no jurisdiction, declared the objection to his jurisdiction well founded, and "in consequence the objection was maintained and the petition of the petitioner was rejected and dismissed." This judgment was appealed from and the now respondent under sec. 48 of Sup. Ct. Act limited his appeal to the question of jurisdiction, and the Supreme Court allowed the appeal.

Held, that Mr. Justice McCord had jurisdiction and ordered that record be transmitted to the proper officer of the lower court to have the said cause proceeded with according to law.

Held, that the court could not, even if the appeal had not been limited to the question of jurisdiction, have given a decision on the merits, and that the order of this court remitting the record to the proper officer of the court *a quo* to be proceeded with according to law, gave jurisdiction to Mr. Justice McCord to proceed with the case on the merits and to pronounce a judgment on such merits, which latter judgment would only be properly appealable under sec. 48, S. and E. C. Act.

FOURNIER & HENRY, JJ., dissented.

The charge upon which this appeal was principally decided is that of the respondent's bribery of one David Apelin. During the election canvass the respondent gave Apelin, at whose house he stopped two or three times $5 for the trouble he gave him. Apelin swore it was not worth more than one dollar.

This amount, together with other amounts paid out by the appellant during the election canvass was not furnished to his agent as part of his personal expenses, and did not appear in the official statement of the legal expenses of the appellant furnished to the returning officer.

Held, that the candidate is bound to include in the published statement of his election expenses his personal expenses, and as appellant had not included in the said return the said amount of $5, and Apelin had not earned more than $1, the paymentof $4 to Apelin by respondent more than was due, was an act of personal bribery.

Judgment of Mr. Justice McCord [6 Q. L. R. p. 100] on the other charges also was affirmed.

Langellier, Q. C., for appellant.

Amyot, for respondent.

MCGREEVY, *Appellant*, v. PAILLE, *Respondent*

Answers to interrogatories—Arts. 228, 229 C. P. C.

The Superior Court at Three Rivers, by its judgment, which was confirmed by the judgment of the Court of Queen's Bench, condemned the appellant McGreevy to pay to the respondent the sum of $3,090.89, for the balance due on the price and value of railway ties made and delivered to the appellant, in accordance with a contract signed by his brother, R. McGreevy, and the respondent. In answer to certain interrogatories which referred to all the matters in issue between the parties, the appellant answered, either "I do not know," or "I have no personal knowledge."

Held, that such answers are not categorical, explicit, and precise, as required by arts. 228 and 229 C. P. C., and that the facts mentioned in these interrogatories must be taken as *pro confessis*, and sufficiently proved the plaintiff's case.

Irvine, Q. C., for appellant.

Hould, for respondent.

RYAN, *Appellant*, v. RYAN, *Respondent*.

Statute of Limitations—Possession as caretaker—Tenancy at will—Finding of the Judge at the trial.

The plaintiff's father, who lived in the township of Tecumseh, owned a block of 400 acres of land, consisting respectively of lots 1 in the 13th and 14th concessions of the township of Wellesley. The father had allowed the plaintiff to occupy 100 acres of the 400 acres, and he was to look after the whole and to pay the taxes upon them, but to take what timber he required for his own use, or to help him to pay the taxes, but not to give any timber to any one else or allow any one else to take it. He settled in 1849 upon the south half of lot 1 in the 13th concession. Having got a deed for the same in November, 1864, he sold the 100 acres to one M. K. In December following he moved on the north half of this lot No. 1, and he remained there ever since. The father died in January, 1877, devising the north half of the north half, the land in dispute, to the defendant, and the south half of the north half to the plaintiff. The defendant, claiming the north fifty acres of the lot by the father's will, entered upon it, whereupon the plaintiff brought trespass, claiming title thereto by possession. The learned judge at the trial found that the plaintiff entered into possession and so continued, merely as his father's caretaker and agent, and he entered a verdict for the defendant. The evidence showed an entry on the land within the last seven years, and thereby created a new starting-point for the statute, and a new tenancy at will.

Held, that the evidence shows that the respondent at first entered and continued in possession of the land in dispute as agent or caretaker for his father; and he subsequently acknowledged himself to be and agreed to be tenant at will to his father, within ten years; and therefore respondent had not acquired a statutory title.

Appeal allowed.

King, for appellant.

Bowlby, for respondent.

In the following cases from Ontario—

WALKER v. CORNELL,

THE SYNOD OF THE DIOCESE OF TORONTO v. DEBLAQUIERE,

NASMITH v. MANNING—(Ritchie, C. J., and Gwynne J., dissenting,)

LONDON LIFE INS. CO. v. WRIGHT—(Ritchie, C. J., and Taschereau J. dissenting,)

the appeals were dismissed, and the judgments of the Court of Appeal for Ontario were confirmed.

QUEEN'S BENCH.

HILARY TERM, 1881.

THE QUEEN v. HOODLESS.

Recognizance—Irregularity.

In a recognizance taken before a Police magistrate pursuant to 32-33 Vict., cap. 30, sec. 44, following the form given in schedule (Q2) to the Act, the words "to owe" were omitted in the printed form which was used.

Held, that the omission was fatal and an action brought upon the same as a recognizance could not be maintained.

Osler, Q. C., for the crown.

Richards, Q. C., for defendant.

SMITH v. FAUGHT.

Ejectment—Will—Restraint upon alienation.

Held, that the direction in a devise in fee simple to A. F. F. by her father that she should "not sell or cause to be sold the above named lot or any part thereof during her natural life, but she shall be at liberty to grant it to any of her children whom she shall think proper," was a valid restraint upon alienation.

Held, also, that the giving of a mortgage by the devisee was not a violation of the restraint, and that the plaintiff, who was mortgagee, was entitled to recover, his mortgage being in default, as against the devisee's son, who claimed by statutory deed from his mother subsequent to the mortgage.

Delamere, for plaintiff.

J. K. Kerr, Q.C., for defendant.

GRIFFIN v. PATTERSON.

Husband and wife—Separate estate—Tenants by entireties.

Action for the price of household goods supplied in 1877 by plaintiff to the female defendant, who was married in 1856 without a marriage settlement and who resided with her husband and family. The husband and wife were seised by entireties under a devise made in 1866. In 1874 the sheriff affected to sell the husband's interest under an execution to the wife.

Held, that the wife's interest in the real estate was not of such a quality as to entitle the plaintiff to a remedy against it.

Held, also, (ARMOUR, J., dissenting), that she was not liable to the plaintiff for the goods supplied.

Per HAGARTY, C. J. The fact that a married woman living with her husband and family orders household goods, raises no implied promise to pay or to bind her separate estate or any presumption save that she acts as her husband's agent.

The interest of the husband being inalienable was not saleable under execution pursuant to R. S. O., cap 66, sec. 39.

Per ARMOUR, J. (1) That whatever might be the effect of the sheriff's sale it should be treated according to the effect ascribed to it by the plaintiff and female defendant by their conduct, viz., as having vested the estate in her.

(2) That there should be a new trial to ascertain whether the plaintiff's claim was the debt of the wife incurred by her in respect of any employment or business in which she was engaged in her own behalf, or whether it arose by virtue of her own contract or was her separate debt. But from the evidence as it stood, it appeared a fair inference that the claim was the separate debt of the wife, part of it being incurred by her in respect of the business of farming in which she appeared to be engaged on her own behalf; that she had contracted in respect of separate personal estate appearing to be hers, and that the name of the husband should be struck out and a verdict entered for the amount against the wife.

Quære, as to the effect of the Married Woman's Acts upon an estate by entireties.

Beck, for plaintiff.

Edmison, for defendants.

COOPER v. HAMILTON.

Ejectment—Statutes of limitation.

John C., being owner in fee of the land in question, some time after 1854 placed his brother James C., in possession to occupy the same rent free. In 1867, defendant having married

daughter of James C., went to live with the latter and occupied a part of the house in obedience to John C., who desired his niece to remain in the house to take care of her infirm mother, who, however, objected to this arrangement. John C. died on the 2nd September 1874 and devised the land to the plaintiff. James C. died in 1873 or 1874, and his wife about a year afterwards. In 1875 one G., with the plaintiff's husband entered and went through the house with the view of renting it, when the defendant said if it was going to be rented he would rent it himself, and pay as much for it as any one, or would buy it. The action was commenced on the 30th March, 1879.

Held, that the plaintiff was entitled to recover as against the defendant who set up the Statutes of Limitations.

Per HAGARTY, C.J.. The defendant was never tenant to John C. during the lifetime of James C. and his widow, and that the statute would not begin to run in his favor till a year after the death of the latter.

Per ARMOUR, J. The entry of defendant in 1867 under John C.'s authority, determined the tenancy at will of James C. theretofore existing, and a new tenancy at will thereupon commenced. Upon the death of James C.'s widow, the defendant became tenant at sufferance to the plaintiff, and her entry by her husband with G. acquiesced in by the defendant, was a sufficient entry to create a new tenancy at will and stop the running of the statute.

Ferguson, Q. C., for plaintiff.

Robinson, Q. C., for defendant.

BARR v. DOON.

Deceit—Fraudulent representations as to mortgage—Duty of purchaser of.

The defendant was mortgagee of the plaintiff's farm, and the latter being unable to pay the mortgage, asked the defendant to buy it, and the defendant offered him therefor some cash and a mortgage for $619, representing to him that the mortgage was a second mortgage, and that any money lender would readily cash it at a small discount, and so induced the plaintiff, an ignorant man, to accept it, when in fact the defendant knew that it was a fourth mortgage, and was almost worthless. The jury found for the plaintiff, on motion for a non-suit.

Held, that there was no obligation cast upon the plaintiff as a matter of law to examine the title or search the registry office, but that his omission to do so was matter for comment only.

Semble, that on sustaining the verdict, a reconveyance of the mortgage to the defendant might be ordered.

Nothing was said as to the amount of the prior mortgage, but the jury having found that the representation was false to the knowledge of the defendant, and was made with intent to deceive the plaintiff, and the verdict not being moved against on the weight of evidence, the Court refused to disturb the finding.

Hagel, for plaintiff.

McCarthy, Q. C., for defendant.

CLARK v. CREIGHTON.

Feme covert—Promissory note—Separate estate.

Action on a promissory note made by the defendant to a feme covert married after 2nd March, 1872, without a settlement, and C. her brother as trustees under their father's will for the purpose of raising money to pay some insurances on the trust estate.

The testator devised his real estate to his trustees, in trust to sell portions to pay debts, invest residue, and expend income in maintenance of the trustees and his other children, until the youngest should attain the age of 21, and on the youngest attaining that age, an equal division to be made amongst all the children, issue of deceased children to represent the parent.

Held, that until the coming of age of the youngest child, C. had no separate estate available in execution, and that she was not liable on the note.

ARMOUR J. dissented, holding that the true construction of the Married Woman's Property Act is impliedly to enable a feme covert to incur debts, to make engagements, and to enter into contracts as if she were a *feme sole*, and that the remedy in respect of any such debts, engagements, contracts or torts, should be against her personally, and should not depend upon whether she ever had any separate estate or not.

J. K. Kerr, Q.C., for plaintiff.

W. Nicholas Miller, for defendant.

COMMON LAW CHAMBERS.

Osler J.] [Feb. 19.

REG. *ex rel.* KELLY v. ION.

Municipal Councillor—Qualification—Value.

This was a *quo warranto* summons, calling on John Ion to show cause why he should not be removed from the office of councillor for the village of Oakville, on the ground of want of property qualification. The property on which the defendant qualified was assessed at $1,600, and upon it there was a mortgage for $1,500. The relator contended that under 43 Vict., ch. 24, sec. 5, the property qualification was clearly insufficient.

Tizard, for defendant, put in affidavits to show that the real value of the property was $2,800. He contended that the amount of the mortgage should be deducted from the real value, and not from the assessed value, in order to arrive at the amount of the defendant's property qualification, and that the oath of qualification never having been changed but referring still to the actual value, the intent of the legislature was clear to base the qualification on the real value after deducting incumbrances. He cited *Reg. ex rel. Bole* v. *McLean*, 6 Prac. R. 249.

Davidson, contra, cited *Reg. ex rel. Flater* v. *VanVelsor*, 5 Prac. R. 319.

OSLER J. *held* that under the Rev. Stat. O., ch. 70, sec. 70, it is clear that the assessed value of the property only can be looked at in arriving at the amount of the property qualification. Summons made absolute to unseat defendant, with costs, and for a new election.

CHANCERY

Proudfoot V. C.] [Jan. 1

BURRITT v. BURRITT.

Appeal from Master's Report—Liability of co-trustees—Foreign securities.

A testator who, by his will, expressed the fullest confidence in C. (one of his trustees), directed them to be guided entirely by the judgment of C. as to the sale, disposal and re-investment of his American securities, and declared that his trustees should not be responsible for any loss to be occasioned thereby. C. having made investments of these moneys which proved worthless, the Master charged his co-trustee R. with the amount thereof.

Held, that even if at the suit of creditors R. might have been chargeable, yet as against legatees he was exonerated.

J. Hoskin, Q.C., for plaintiff.

Boyd, Q.C., contra.

OWENS v. TAYLOR.

Patent for invention—Novelty—Royalties payable under void patent.

The mere attaching of the support of the handle of a pump higher or lower in position than that formerly in use, is not the subject of a patent; but P. having obtained a patent therefor which he assigned to the plaintiff who again assigned to the defendant subject to certain royalties,

Held, that notwithstanding the invalidity of the patent he was entitled to recover the amounts payable to him under the agreement during the currency thereof.

Boyd, Q.C., for plaintiff.

Moss, contra.

SCHOOL TRUSTEES OF THE TOWNSHIP OF HAMILTON v. NEILL.

Officers of corporation—Irregular appointment.

One T., who acted in the capacity of Secretary-Treasurer of the plaintiffs, who had not been appointed in writing, and had not given security as required by the Statute in that behalf, absconded with certain moneys which had been received by him as such Secretary-Treasurer from the defendants. The plaintiffs had recognized T. as their Secretary-Treasurer by intrusting him with the custody of their books and papers, by allowing him to receive moneys for them, by auditing his accounts and receiving and approving of the auditor's reports.

Held, that R. S. O. cap. 204, sec. 99, which provides that, in the case of a rural school section corporation, the resolution, action or proceeding of at least two of the Trustees shall be necessary in order lawfully to bind such corporation, does not apply to acts of duty of the Secretary-Treasurer.

Held, also, that, if a person acts notoriously

as the officer of a corporation, and is recognized by it as such officer, a regular appointment will be presumed, and his acts will bind the corporation, although no written proof is, or can be, adduced of his appointment.

Moss, for plaintiffs.

Boyd, Q.C., contra.

WALMSLEY v. RENT AND GUARANTEE CO.

Corporation—Ultra vires—Liability of directors and shareholders.

A Company, receiving money on deposit, which is placed to its credit at a bank, is liable for the money so received, though the taking of money by deposit be *ultra vires*; and if the officers of the Company use such moneys in other *ultra vires* transactions, that may be a proper matter for the shareholders to charge those officers with, but it is not one with which the depositor has anything to do.

One E. advanced $4,000 to I. & M., on the guaranty of the defendant Company, clearly acting *ultra vires*, who obtained, as security for such guaranty, an order from I. & M., on the Water Works Company, for the amount. I. & M. afterwards induced the defendants to give up the order on replacing it by orders for half the amount. E. recovered judgment by default against the defendants, and by *sci. fa.* realized the amount of his loan.

Held, 1. Affirming the master's report, that B. who was one of the directors of the defendant company, and who had been instrumental in procuring the above guaranty, was properly charged with the amount the defendants had lost through the delivery up of the order on the Water Works Company; but that he was not liable for the balance of the claim of E., since it had been made up to the defendants by the moneys realized on the orders by which the order so delivered up had been replaced.

2. That before directors can be charged for an act *ultra vires* the act must be shown to amount to a want of *bona fides*, and not merely a mistake or error of judgment.

Semble 1. That when such transactions are before shareholders at a public meeting, they are equally liable with directors.

2. That there may be contribution between parties to acts *ultra vires*, as distinguished from illegal acts.

3. That the judgment of a stranger against a Company is not *res adjudicata*, as between directors and shareholders, and does not prevent the latter from showing that the transactions giving rise to the suit were *ultra vires*.

W. A. Foster, for plaintiff.

Spencer, and *W. Cassels*, for Company.

Maclennan, Q.C., *Moss*, and *Bain*, for other parties.

Spragge, C.] [Feb. 15.

ADAMSON v. ADAMSON.

Statute of limitations—Equitable remainder—Practice—Dismissal of former bill—Reading evidence in former suit—Secondary evidence.

The plaintiff, who was a *cestui que trust* in remainder, acquired the legal estate three years after the death of the tenant for life. It was attempted to be shewn by the defendant who, with her husband, had been in possession by herself or her tenants for eleven years when the tenant for life died, in 1875, that she was entitled to the land by length of possession.

Held, that the facts in the case would no support such a contention, as no laches could be imputed to the plaintiff for not having compelled the trustee to take proceedings to obtain possession at an earlier date, as his right had only been acquired on the death of the tenant for life, and therefore his right to the land was not barred.

A former suit had been instituted by the plaintiff, which had been dismissed as the plaintiff had not acquired the legal estate until after the bill was filed.

Held, (1) that under such circumstances the question was not *res judicata*; (2) and that the evidence taken in the former suit was admissible in the present one, the issue being practically the same.

The deed declaring the trusts upon which certain lands were held, a true copy of which was produced at the hearing, was traced into the hands of certain parties and every search therefor had been made, but without success:

Held, that sufficient was shewn to entitle the plaintiff to give secondary evidence of the instrument.

Mowat, Q.C., and *Maclennan*, Q.C., for plaintiff.

Blake, Q.C., and *Bethune*, Q.C., contra.

Spragge, C.] [Feb. 15.

GREENSHIELDS v. BRADFORD.

Statute of limitations—Care-taker—Pleading—Purchase for value.

B. entered into possession of a small portion of a lot of land which was in a state of nature, and upon the agent of the owner discovering him to be so in possession, he having fenced and cultivated the same, suffered B. to remain in such possession, and B. agreed to look after the property in order to protect the timber and B. subsequently sold his interest to T. On a bill filed by the owners,

The Court, [SPRAGGE, C.], *held* that under the circumstances the statute of limitations did run in favor of B. so as to give him a title by possession, and that T. was not entitled to the benefit of the defence of "purchase for value without notice," he having omitted to allege that B. was seised; that T. believed he was seised; that B. was in possession and that the consideration for the transfer by B. to himself had been paid.

Spragge C.] [Feb. 15.

LARIO v. WALKER.

Conveyance in fee—Repugnant limitations—Pleading—Demurrer.

The grantor conveyed certain lands to the grantee, his heirs and assigns, and by a proviso at the concluding part of the deed declared, "nevertheless, that the above L. shall have no right to sell, alien, or dispose in any way whatsoever of the above mentioned premises, but have only the use during his life-time, after which his children will have full right to the said property above mentioned."

Held, on demurrer that such proviso was repugnant to the grant and *habendum* in fee and therefore void.

The bill stated that the plaintiff was grandson of L. who had died intestate.

Held, that this sufficiently stated the title of the plaintiff.

Boyd, Q.C., for plaintiff.

Caswell, contra,

CHANCERY CHAMBERS.

HUGHES v. HUGHES.

Referee.]

Proudfoot, V. C.] [Feb. 14.

Examination proceeding pending before Court—Filing bond—G. O. 268.

A surety in an appeal bond may be examined on his affidavit of justification before a special examiner under G. O. 268, the filing of such bond being a "proceeding" before the Court within the terms of that order.

Donovan, for appellant.

G. Morphy, contra.

Spragge C.] [Feb. 15.

LONDON v. EVERITT.

Foreclosure—Infants—Day to show cause.

A final order of foreclosure should reserve a day for infant defendants to show cause. The Court (SPRAGGE C.) declined to change this practice, but for the sake of putting an end to litigation and to the evil of leaving estates tied up for perhaps many years, expressed an opinion that it would be well for the practice to be altered.

Arnoldi, for plaintiff.

Plumb, contra.

MASTER'S OFFICE.

The Master.] [Jan. 24.

MOORE v. BOYD.

Examination of a co-defendant adverse in interest—Construction of G. O. 138.

A defendant whose interest is identical with that of the plaintiff is a party adverse in interest to her co-defendant, and may be examined by such co-defendant under G. O. 138. Where the plaintiff's solicitor is present at such examination it may be read at the hearing against the plaintiff.

G. H. Watson, for plaintiff.

Moffatt, for defendant.

REPORTS.

(Reported for the LAW JOURNAL.)

RATHBURN v. BURGESS.

Mechanic's lien—Demurrer—Pleading.

A bill to establish a mechanic's lien should allege that there was no agreement that the plaintiff was not to have a lien for the price of the work or materials in respect of which the lien is claimed.

Quære, whether a suit to establish a mechanic's lien for an amount within the jurisdiction of a County or Division Court must be brought in such County or Division Court, and not in the Court of Chancery.

Proudfoot, V. C.] [Jan. 19.

A bill was filed to establish a lien for $71, the price for materials furnished for and used in the construction of a house on lands of defendant. The bill did not allege that there was no express agreement to exclude the lien. The defendant demurred for want of equity.

Langton, for the demurrer. The lien exists if at all by virtue of sec. 3 of Rev. Stat., c. 120, and unless the bill negatives the existence of an agreement excluding the lien, a case is not made out within the Act.

Sec. 13 of the Act shews that it is only in cases other than those within the jurisdiction of a County or Division Court that the lien is to be realized in the Court of Chancery.

Henderson, (Belleville) contra. If there is any agreement that is a matter to be raised by answer.

The inherent jurisdiction of the Court of Chancery is not taken away by the clauses of the Act which confer jurisdiction in certain cases upon County and Division Courts. The language of sec. 12 is permissive only.

PROUDFOOT, V. C., without expressing any opinion as to the question of jurisdiction, held that as the right to a lien was a new one existing only under the Act, a case should be brought strictly within the terms of sec. 3, and the bill should therefore allege that there was no agreement that the plaintiff was not to have a lien for the price of the materials furnished. He allowed the demurrer with costs, giving the plaintiff liberty to amend generally.

Demurrer allowed.

LAW STUDENTS' DEPARTMENT.

LEGAL EDUCATION.

The ideal lawyer is an embodiment of all the virtues and attainments of Coke, Bacon, and Erskine. He should combine the mastery of the technicalities of law with that universal knowledge which Bacon took for his province, and with the ability to enforce his own propositions and remove the prepossessions of others.

It is no royal road that leads to the attainment of an ideal so high and so difficult, and therefore no means should be neglected whereby its difficulties may be lessened, and the path of the travellers to "Fame's proud temple" rendered more easy. Amongst these means education professedly stands pre-eminent, and the enquiry is therefore a pertinent one why in a province like Ontario where its claims are so universally acknowledged in other departments of knowledge, there is no regular system of legal instruction.

There are two plausible reasons which may be urged against the introduction of such a system—one is that there is no necessity for it, and the other—probably the only other—is that there are no funds available for its foundation and support. Is either of these objections applicable? Does any one question the difficulties to be encountered by all law students in the acquisition of the learning necessary to the practice of the profession? Has it ever been suggested that of all courses of study, that of law stands out as so pre-eminently easy that no such assistance in it is requisite? Or does any one assert that lectures or oral instruction are of little value if given by competent teachers? It has indeed sometimes been argued that lectures are principally valuable where experiments are necessary; but it is not doubted that apart from such cases, lectures, if given by well-read men with a dash of enthusiasm in their composition, render most valuable assistance to the student. This principle has been recognized and acted upon in almost all countries where law has reached an advanced stage of development. There is no need, however, for going from home for recognition of the principle. It is recognized in all departments of study except law, and it has several times asserted itself and found acceptance. Perhaps the most crucial

test, however, of the value of oral instruction to a law student would be to supply lectures, the attendance at which should be purely voluntary, and the benefits from which should not consist in prizes or the shortening of the period of service, but merely in the assistance in their studies which the students felt themselves to be receiving. If the time could be better spent in reading, or if the pleasures of other engagements outweighed the benefit received, then the lectures would be delivered to empty benches. If, on the other hand, they were found to be useful, the advantage would probably be a sufficient incentive to the expenditure of the time and effort necessary to a large attendance.

This test has been supplied during the present winter by The Osgoode Literary and Legal Society. A course of lectures was arranged and proceeded with for some time without the promise or expectation of any rewards other than advancement in legal education. The result was an attendance far beyond the capacity of the examination room at Osgoode Hall. Even standing room was, on some occasions, not to be found ; and late comers found themselves sometimes unable even to get near enough the door to hear what was being said. The Law Society afterwards very properly proposed that if the Literary Society under certain regulations would at the close of the Session hold examinations, a sum of $100 would be spent in providing prizes for the successful competitors. This proposition was accepted, but the fact remains that without this inducement the attendance was large and enthusiastic. If the students are the best judges in this matter, and their decision is such as has been indicated, further argument is unnecessary.

Then as to the other objection. Is there no fund for the foundation and support of some system of legal education? Nearly one half of the revenue of the Law Society is derived from fees paid by the law students. If the Law Society requires these fees for its other purposes, perhaps this fact would be without significance. But when it is known that the revenue of the Law Society is beyond its power of disbursement, it is a fact which forms a complete answer to this second objection.

Are there any other objections? It has been said that there is a jealousy of Toronto. This is not an objection, and would not be urged as such, no matter how actively it might assert itself in forming opposition to any scheme which might be proposed.

It has also been said that the Ontario Bar has produced many men, accomplished and able, without any such scheme. This is no answer to what has been said. The statement must go further to be of any value, and show with what additional expenditure of time and labor these men reached their positions, and how many have failed to reach eminence because of the lack of such aids to legal attainment.

Are there any other objections? We know of none. Shall we then see some system introduced, or must the matter be left to the Osgoode Literary and Legal Society to cope with as best it can? We trust the former alternative will prevail, and commend the matter to the Ontario Government and the Law Society.

We understand that the name of W. White, in the list of gentlemen called to the Bar last term, should in order of merit have appeared immediately after that of P. Mulkern.

FLOTSAM AND JETSAM.

There are several ways of stating one's disagreement with the views of another. The following strikes us as peculiarly neat. It appears that a certain "Col." Tom Buford murdered Judge Elliott of Kentucky. The *Albany Law Journal* says: "It seems that the Colonel was insane. He is probably now enjoying a lucid interval which will last during the remainder of his useless and accursed life unless interrupted by more seasons of debauchery and bad temper, and a fresh grudge against somebody who may offend him"

TO CORRESPONDENTS.

A. G. M.—It was not contended in *Robins* v. *Clarke et al.* that the chattel mortgage was within the statute, in fact it could not be. This case therefore could be no authority in *Nisbet* v. *Cook* on the point you refer to.

J. and R.—We are indebted to you for two cases of interest which will appear in due course. We agree with you that one is right, but much doubt as to the other.

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DIARY FOR MARCH.

1. Tues...Co. Ct. sitt. for York begin. Ct. of Appeal sitt. begin.
5. Sat.....Osler J. appointed.
6. Sun....Quadragesima Sunday. Name o. York changed to Toronto, 1834.
11. Fri.....First London daily paper, 1702.
13. Sun.....2nd Sunday in Lent.
17. Thurs..St. Patrick's Day.
18. Fri.....Princess Louise born, 1848.
20. Sun.....3rd Sunday in Lent.
23. Wed.....Sir George Arthur, Lieut.-Governor U. C., 1838.
27. Sun.....4th Sunday in Lent.
28. Mon...Canada ceded to France, 1632.
30. Wed...B. N. A. Act assented to, 1867.
31. Thurs..Lord Metcalfe, Governor-General, 1843.

TORONTO, MARCH 15th, 1881.

WE understand that the vacancy in the Chief Justiceship of the Court of Appeal has been filled by the appointment of the Chancellor to that position. No other appointments have as yet been made.

George C. V. Buchanan, Esq., Q. C., has been appointed one of the Judges of the Superior Court of the Province of Quebec, in the room of the late Judge Dunkin.

THE new Ontario Judicature Act has now become law and before the 22nd of August next, every member of the profession must have made himself tolerably familiar with an entirely new system of pleading and practice. Any aid, therefore, to the understanding of the voluminous and, for a simplification of practice, complicated code of the new procedure will be welcomed. Of the three or four editions of the Act which have been announced, or about which rumour has whispered during the last few weeks, those which are most looked forward to are undoubtedly those of Mr. James Maclennan, Q. C., and of Mr. T. W. Taylor, Q. C.

MR. TAYLOR is so well known to the profession as an author and annotator that we need not enlarge upon his qualifications for such a work. His book on the Chancery Orders has been simply invaluable to the equity practitioner, and it will be generally felt that few better men could be found to do this work than Mr. Taylor. He has proved himself a painstaking and faithful annotator, and no one of course, is more familiar with the Chancery practice, which has largely entered into the construction of the Rules and Orders under the new Act.

MR. TAYLOR'S work will doubtless have a formidable competitor in Mr. Maclennan's, which is already in an advanced stage of preparation. Our readers will remember that last year, upon the submission of a Judicature bill for the consideration of the Legislative Assembly, an announcement was made by Mr. Maclennan of his intention to publish an edition of the Act in case it became law. While the profession and the public have been a year considering the proposed bill, Mr. Maclennan has, apparently, not been idle. We have had an opportunity for perusing the advance sheets of the work, which promises to be not merely a most lucid and masterly commentary upon the Act, but also a complete and comprehensive compendium of the practice of the Courts.

Mr. Maclennan's qualifications for such a work must be at once recognized by all. His varied and extensive knowledge of the law has raised him to one of the most promi-

nent positions at the Bar, whilst his painstaking accuracy and industrious research are well known to his brethren. To understand any amending Act, a knowledge of the pre-existing law is always essential ; and in order to present to both the Common Law and Chancery practitioner a really clear explanation of many of the clauses of the new Act, a thorough knowledge of the present practice in all the different courts is absolutely necessary. For this reason Mr. Maclennan is eminently well qualified for the task he has undertaken. Although, for some years past, he has been most in the Court of Chancery, the Courts of Common Law were, nevertheless, the arena in which his first honors were won ; and few of those who have become eminent as counsel have taken as much care as he has, that their knowledge of mere matters of practice should not become rusty. This knowledge of both systems will be of great help to Mr. Maclennan, and of much benefit to his readers.

THE profession are fortunate in having the benefit of the labors of these gentlemen in assisting them to a knowledge of a procedure entirely new to us. Few of those who have any business to do in the Courts will be without a copy of each work. The long vacation will give us a desirable opportunity of indulging in a little of that pleasant light reading which these gentlemen will provide. If the Attorney-General, who has brought in this Act, and is doubtless familiar with its details, would kindly shut up the legislative shop that has passed it, for a few years, he might save them the task of annotating supplements, and the rest of us of spending a weary existence in trying to keep pace with complicated and never-ending alterations in the practice.

A LATE decision in the English Common Pleas Division has added to the Humors of the Law. The Court there set aside the finding of the jury in a compensation case against a Railway Company, on the ground that the claimant had treated the jury to a champagne lunch. The judge took occasion to distinguish between, and differentiate the dangers to be apprehended from divers classes of luncheons, e. g., the luncheon unpremeditated and the luncheon prepared beforehand ; the champagne luncheon and the non-champagne luncheon. The law, in such cases, abhors hospitality, especially where the cup is passed "with beaded bubbles winking at the brim."

THE law relating to sign-boards has been discussed before Chief Judge Bacon in a case involving the ownership of a well-known picture by David Cox which was painted on the sign-board of the old inn at Bettws-y-Coed, called "The Royal Oak." Upon the insolvency of the tenant, it was claimed by the landowner as a fixture which passed with the inheritance, and the County Judge so decided —but was reversed on appeal, the Chief Judge holding that it had been painted by the great artist for the innkeeper in 1847, who was on terms of friendship with him, and that it had been hung up as his picture and had never lost its character as a tenant's fixture. *Ex. p. Shaun ; 29 W. R. 248.*

A CORRESPONDENT in British Columbia has kindly sent us a copy of "The Rules, prepared by Mr. Attorney-General Walkem, to Carry into Effect the Supreme Court Act of that Province." We have not had an opportunity of examining them, but, doubtless, they have been carefully considered by the profession in British Columbia, and the opinion there is set forth in the following resolution, unanimously passed at a large meeting of the Incorporated Law Society, recently held at the Secretary's office :—

"*Resolved*, That the Incorporated Law Society of British Columbia desire to express

their thanks to the Hon. Mr. Walkem, for the very able and satisfactory manner in which he has accomplished the difficult undertaking of compiling a new code of Supreme Court Procedure, and their appreciation of the immense amount of labor which, in spite of the grave and arduous duties of the Attorney-General, has been bestowed upon the Code—a work which will form the basis of all future civil practice in the Province."

JUDGE TOURJEE in his "Fool's Errand" with quiet humor adverts to his hero as having a good home "undistinguished by mortgage or incumbrance of any sort." We fear that this distinction obtains in the case of a great many farms in a great many townships in a great many counties of "this Canada of Ours." Let us trust that the Building Societies and Loan Companies may not ultimately become the proprietors of all this property, and oust the bold yeomanry, "their country's pride."

WE are indebted to Mr. Alpheus Todd, Librarian of Parliament, for an interesting and instructive contribution to the law on the much vexed question of Marriage with a deceased wife's sister, which, however, we are compelled, from want of space, to hold over until next number. All will not agree with Mr. Todd's views, but whatever he writes for publication is well written and worth reading. His argument is, of course, based on the construction to be placed on the greatest of written codes, on which, indeed, all argument on this subject is founded.

LOSS OF BUILDINGS BY FIRE, PENDING CONTRACT OF SALE.

The power of Case-law has been very pointedly illustrated of late by two decisions; one in this Province and one in England. When property is contracted to be sold and the buildings upon it are consumed by fire before the completion of the transaction, upon whom, the vendor or the purchaser, does the loss fall? The law for no particular, or no sufficient reason, that we can see, has settled the matter differently, according as the sale has been by private contract, or by order of Court. In the case of private contracts the equitable rights of the parties are fixed when the agreement is signed. The estate is considered as belonging to the purchaser from the date of the contract, and the price as belonging from that time to the seller. So far back as 1801 Lord Eldon held, in *Paine* v. *Meller*, 6 Ves, 349, that when in such a case the building is burnt, the loss falls upon the purchaser. Last April the point was again presented before the Master of the Rolls, in *Rayner* v. *Preston*, 28 W. R. 808, who said if the matter was *res integra* that he might have found some means of relieving the purchaser. But being concluded by the cases, he held that where premises contracted to be sold was damaged by fire before the completion of the purchase, the purchaser had no right to money received by the vendor from an insurance office, and had no right to require the vendor to lay it out in restoring the premises.

But in the case of sale under judicial proceedings in the Court of Chancery, a diverse conclusion has been reached, by virtue of a decision of the same judge, in 1805,—the "cloud-compelling Lord Eldon," as he has been irreverently called. In *Ex parte Minor*, 11 Ves. 559, he held that a purchase before the Master was not complete until the confirmation of the report of sale. This was at variance with many decisions, among the rest *Saville* v. *Saville*, 1 P. Wms 748, when it was said that the purchase after the report was called a contract between the purchaser and the Court. However, Lord Eldon decided that a loss by fire after the report, but before its confirmation, fell upon the vendor. The same matter came up last

year, before Vice-Chancellor Proudfoot for decision on an appeal from the referee in *Stephenson* v. *Bain*, 8P. R. 258. He held, following *Ex p. Minor*, that when the buildings were burnt the next day after the sale under the decree, and after the usual contract to purchase had been signed, the loss would fall on the purchaser, against whom the report on sale had been confirmed in due course by the lapse of a month.

It will be observed that the question presented in both cases depends upon determining to whom the property belongs between the initiation of the contract of sale and its completion. In cases of sales out of court it is held that the property belongs to the purchaser the moment a binding contract is made, and all that is afterwards done in the way of exhibiting and accepting the title and executing the conveyance relates back to the starting point. If this is a good rule there seems to be no reason for not applying the same considerations to sales by order of Court, and to hold that from the day of sale the purchaser is the owner, and that the confirmation of the report on sale relates back to that time. There is the more reason for this in the case of sales in Ontario because of the difference in practice as to opening biddings which obtains here and in England. Among other differences is the fact that offers of increased price were sufficient to open the sale in England, but such is not the case here, as was remarkably exemplified in *Mitchell* v. *Mitchell*, 6 P. R. 232. There the plaintiff was allowed to bid while retaining the conduct of the sale, and became the purchaser at the price of $3,200. The defendant, who was not at the sale, moved to open the biddings and offered $5,500, while the plaintiff admitted that rather than lose the place he would have given $7,000. Yet in these circumstances the Chancellor declined to disturb the sale.

The weight of United States law is in favour of there being uniformity in all cases, whether the sale is a private or a judicial one, and their courts hold that the rights of the parties are determined at the date of the sale, and that from that time the vendee is the owner of the property.

When the property is insured by the vendor it is inequitable to let him have both the purchase money and the insurance money. In effect, by the decision of the Master of the Rolls, he is twice paid, while the vendee is made to pay for what he does not get. Nor would it seem to be beyond the reach of the Court to deal equitably with this matter as between vendor and vendee under the provisions of Imp. St., 14 Geo. III. c. 78 s. 83, which has been held to be in force in this Province: see *Stinson* v. *Pennock*: 14 Gr. 604. That act provides in substance that upon the request of any person or persons interested in or entitled to any house, etc., which may be burnt, etc., the Company are required to cause the insurance money to be laid out, as far as it will go, towards rebuilding, reinstating, or repairing such house, etc., unless the party claiming the insurance money shall give a sufficient guarantee to the company that the money shall be so laid out. The Master of the Rolls seems to have overlooked this or a similar provision now in force in England, as appears from *Ex parte Goreley*: 4 De G. J. and S. 477, which might have modified his decision, as he intimated his readiness to do, had he not been bound, as he conceived, by the authorities.

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

Q. B.] [March 2.

FRYER v. SHIELDS.

Insolvent Act of 1875—Privileged claim—Action for wages.

The plaintiff sued for wages as a clerk of the defendants who pleaded their discharge in insolvency. The plaintiff replied that his claim was privileged and relied upon the 63rd section of the Act as entitling him to recover personally against the insolvents, notwithstanding their discharge to which he had not consented.

Held, reversing the judgment of the Court below for the plaintiff in demurrer to the replication, that the privileged claims are not within the class of debts to which a discharge does not apply without the consent of the creditors thereof, and that the remedy of the plaintiff was against the estate of the insolvents either before or after discharge, and not personally against the insolvents.

Mulock, for appellant.

G. Kerr, jr., for respondent.

Q.B.] [Marcb 2.

THE AGRICULTURAL SAVINGS AND INVESTMENT SOCIETY v. THE FEDERAL BANK.

Cheque — Signed endorsement — Liability of Bank paying same.

One S. by forging an application for a loan and a mortgage in the names of J. T. B. and J. B., and representing certain facts as to the land to the plaintiff's agent who contented himself with the representations of S., and certified a valuation to the plaintiff, procured the completion of a supposed loan. Cheques payable to the order of the supposed borrowers were obtained by S. who forged the names of the payees to the cheques, endorsed his own name and procured payment of the cheques from the defendants upon whom they were drawn. The fraud was not discovered for some time, during which the cheques were returned to the plaintiffs at the end of the month as paid, whose officers signed the usual acknowledgment of the correctness of the account.

Held, affirming the judgment of the Queen's Bench that the defendants having undertaken the responsibility of paying cheques payable to order were bound to pay the proper parties, and that they could not charge the plaintiffs with moneys wrongly paid.

Held also, that the acknowledgment of plaintiffs of the correctness of the account at the end of the month, was at most an acknowledgment of the correctness of the balance on the assumption that the cheques had been paid to the proper parties.

Held also that the plaintiffs were not estopped from recovering by their agent's negligence, as it did not occur in the transaction itself and was not the proximate cause of the loss to the defendants.

Robinson, Q. C., and *Kerr*, Q. C., for appellants.

Bayly, for respondents.

C. P.] [March 2.

PIPER v. SIMPSON & LOWRY.

Lease—non-execution of by one lessee—Action on covenant for rent.

The defendants and one C. being in possession of premises under a covenant from the plaintiff for a lease, the plaintiff caused a lease to the three to be drawn which was executed by the defendants on the representation that C., the manager of the business, had executed a counterpart thereof. As a fact C. had refused to execute the lease and had not executed any lease. The defendants and C. continued to occupy the premises and paid some rent.

Held, affirming the judgment of the Common Pleas, that upon the evidence there was no intention by either the plaintiff or the defendants that the latter should be dealt with apart from C. ; that there was no delivery of the deed, and that therefore the plaintiff could not recover rent on an action upon the covenant.

Bethune, Q.C., for appellant.

MacKelcan, Q.C., for respondent.

C. C.] [March 2.

OCKLEY v. MASSON.

Agency—Evidence—Statute of Frauds, sec. 17.

Held, upon the evidence, that one K., who had made a sale for the defendants to the plaintiff, had been held out as the agent of the defendants for making sales. K. entered the plaintiff's order in a book, and reported the sale to the defendants by letter which was not produced at the trial, though called for. The defendants wrote the plaintiffs that "K. reports a sale that we cannot approve in full but will accept for" a certain number of articles. On the plaintiffs insisting on the whole order, the defendants cancelled it.

Held, that the letter of K. to the defendants was a sufficient memorandum to satisfy the 17th section of the Statute of Frauds, which requires it for evidence only, and that it made no difference that it had passed between the defendants' agent and themselves; and at any rate the letter of the defendants to the plaintiff was a sufficient memorandum of their agent's sale, and its effect was not impaired by the partial disapproval expressed in it.

Reversing the judgment of the County Court.

C. Robinson, Q.C., for appellant.

T. Ferguson, Q.C., for respondent.

Ch'y.] [March 2.

KEEFER v. MERRILL.

Mortgage of freehold—Unattached machinery—Fixtures.

A mortgagee of vacant lands adjacent to his stone factory erected thereon a frame building as a lean-to to the factory, and placed in it, for the purposes of carrying on his manufacturing business, three lathes, an iron planer, two drills, a crane, and a shaper, all of which were kept in position by their own weight without being fastened to any part of the building, with the exception of one drill which was bolted to the framework, the latter being bolted to the girders. The land was vacant when the mortgage was given, and not worth the money, but building was contemplated, and there was the statutory covenant in the mortgage to insure for $4,000.

Held, reversing the decision of the Chancellor, that the machines were not put into the building with the intention of improving the freehold, and that they did not become fixtures.

Per BURTON, J. A. The question of intention is mainly to be looked at in all cases, the distinctions between them being as to what is sufficient evidence of the intention. The mere fact that machines are brought upon the land by the owner of the freehold raises no presumption that he intends to make them part of the realty, though annexation thereto would raise such presumption.

Per PATTERSON J. A. The weight of authority is against construing as fixtures anything which is not annexed in fact to the realty, except where the articles form part of the fabric, as an integral portion of the architectural design.

Cassels and *Walker*, for appellant.

Delamere and *Black*, for respondent.

Ch'y.] [March 2.

EARLS v. MCALPINE.

Devise—Restriction upon alienation—Forfeiture.

A testator willed that his wife should have the use and control of all his property, real and personal, until his two sons should become twenty-one, or until the said property should be disposed of as thereinafter mentioned. Then followed a devise to his son W. of half his farm, "to be possessed by him when twenty-one," subject to legacies; and a devise to his son H. of the other half of his farm, "to be possessed by him when twenty-one," subject to legacies. The testator then says, "My two sons, H. and W., give to my wife a comfortable support, or the sum of £10 each, annually, during her natural life. * * * I also will that my sons H. and W. do not sell or transfer the said property without the written consent of my said wife during her life." The will was duly registered after the testator's death. H., after attaining twenty-one, mortgaged his share, without the knowledge and consent of the widow, to the defendants, C. and M., who sold, on default in the mortgage, to O., who bought with notice of the condition as trustee for M. The heirs-at-law then filed their bill for partition, claiming that H. had forfeited his estate under the will by violation of the condition.

Held, affirming the decree of Blake, V. C., that the restriction upon alienation was valid; and that there was a charge created upon the land for the benefit of the widow; that the mortgage was a breach of the condition annexed to the devise, not to sell or transfer without consent, upon which the heirs at law were entitled to enter.

Blake, Q. C., and *Bethune*, Q. C., for appellant.
O'Leary, for respondent.

Ch'y.] [March 2.

KILBOURN v. ARNOLD.

Foreclosure—Fiduciary relation between mortgagor and mortgagee—Evidence.

In a foreclosure suit the defendant set up, that the plaintiff, a solicitor, had been employed by him to procure a loan of $1,400, to pay off a mortgage, on which there was due some $2,000, and that the plaintiff had taken advantage of this to purchase the mortgage at that price.

It appeared that the plaintiff had been applied to by the defendant to procure a small loan, but had been unable to do so; and that he had also acted for B., the mortgagee, in trying to sell the mortgage to a Loaning Company, but had failed, sometime after which he bought the mortgage himself for $1,625.

Held, reversing the judgment of the Court below upon the evidence that there was no confidential or fiduciary relationship established between the parties, and that the defendant should pay the whole amount of the mortgage or, in default, foreclosure.

C. Robinson, Q. C., for appellant.
Bethune, Q. C., and *McIntyre*, for respondent.

Ch'y.] [March 2.

MCGRADY v. COLLINS.

Title by possession—Evidence.

The plaintiff relied on acts of ownership by another and himself successively, but not in privity with each other, which consisted in driving cattle across a small piece of ground and across a stream, in order to sustain a bill to restrain the cutting of ice upon a portion of the stream.

Held, affirming the judgment of the Court below, upon the evidence, that it was not included in the plaintiff's conveyance, nor was in his exclusive control; that the facts were plainly insufficient to support the bill, which was properly dismissed.

Street, for appellant.
Meredith, Q. C., for respondent.

Ch'y] [March 2.

HARVEY v. STUART *et al.*

Partnership—Evidence.

The plaintiffs filed their bill against the defendants, T. and S., and three others, charging that a partnership existed amongst them, and alleging that all parties had formed a plan for building an elevator; that it was intended to form a joint stock company, but in order to secure business at once that the plaintiffs had been authorized to borrow money on anticipation for the purpose of carrying out the scheme. This they did upon their own responsibility, and the elevator was built and worked, but the efforts to form a joint stock company failed, and they now asked that the alleged partnership be wound up. Various meetings of the parties took place, but they were informal, and certain minutes produced were set up by the plaintiffs as correct minutes of the meetings by which they sought to implicate the defendants. The minutes, besides bearing evidence of incorrectness on their face, were proved to be unreliable and to have been made some time after the meetings. The defendants set up that the plaintiff had not been authorized by them to raise money, but that while there was every prospect of success that the plaintiffs were anxious to take the risk upon themselves and secure the expected benefits, and that it was only after the venture proved a loss, and that they had to disburse largely, that they sought to make the defendants contribute. The bill was dismissed at the hearing as against all the defendants except S. and T., and a decree was made declaring that the plaintiffs and S. and T. were as between themselves jointly and severally liable for the money expended and liabilities incurred in and about erecting the elevator, &c. The defendants, S. and T., appealed from this decree. The whole question was one of fact.

The court was equally divided BURTON and

MORRISON, J.J. A., being of opinion that the bill was not sustained by the evidence, and that the appeal should be allowed; while PATTERSON, J. A., (ARMOUR, J., concurring with him) was not able to say upon the whole evidence that the learned Vice-Chancellor was wrong in making the decree. The appeal was therefore dismissed.

MacKelcan, Q. C., and *Bethune*, Q. C., for Turner.

Ferguson, Q.C., *McCarthy*, Q.C., and *Bruce* for Stuart.

Blake, Q. C., and *E. Martin* Q.C., for the respondents.

Ch'y.] [March 2.

PETERKIN v. MACFARLANE.

Practice—Vacation of decree as against one defendant—Effect as to remaining defendants.

A decree had been made against several defendants, one of them being administrator *ad litem* of an original defendant who died before answering. B., a defendant, appealed from the decree which was vacated as to time, and he was allowed to file a supplemental answer and have a new hearing of the cause. The administrator died after decree, and another administrator *ad litem* was appointed, *pro forma*, to represent the estate of the deceased. He was served with no proceedings, and it was stated on this argument that the plaintiff asked no further relief against the estate. The latter obtained from the referee an order allowing him to file a supplemental answer setting up defences which his predecessor had omitted, which was reversed on appeal to Proudfoot, V.C.

Held, affirming the order of the Vice-Chancellor, that the vacation of the decree as against B. did not necessarily open the case as against the deceased's estate, and that the referee had therefore no power to allow the administrator to answer while the decree stood as against him.

C. Robinson, Q.C., and *T. Langton* for appellant.

W. Cassels, contra.

C. C. York.] [March 2.

BLAND v. EATON.

Contract to procure lease—Statute of frauds—Memorandum—Sufficiency of.

The defendant desiring to enlarge his warehouse by occupying the premises adjoining those in his possession, offered the plaintiff, whose lease of the desired premises was about to expire, $300 to procure from the owners thereof a lease which should be assigned to the defendant, with liberty to open a door-way between the houses. The terms and conditions of the desired lease were left to the plaintiff who was to make the best terms he could. At the request of the plaintiff that the offer should be put into writing the defendant wrote to him the following letter:—

To MR. JOHN BLAND:

DEAR SIR,—In reply to yours of to-day, I propose to give you $300, provided you can give me a transfer lease with privilege to make an opening between your premises and my own, cash to be paid on completion of transfer lease. This is as I understand it.

Yours most truly,

T. EATON.

The plaintiff procured a lease and tendered an assignment of it to defendant who refused it, whereupon the plaintiff sued for the $300.

Held, reversing the judgment of the County Court, that the letter of the defendant was a sufficient memorandum to satisfy the requirements of the 4th section of the Statute of Frauds within which the agreement fell, as being a contract by which the defendant was to receive an interest in land from the plaintiff.

Bigelow, for appellant.

Rose, for respondent.

C. C. York.] [March 2.

FISKEN v. O'NEILL.

Insolvent Act of 1875—Sale of debts over $100 en bloc—Validity of.

Held, affirming the judgment of the County Court, that section 67 of the Insolvent Act of 1875, giving power to sell the uncollected debts of the insolvent, expressly limits the power to selling in the manner prescribed thereby; that the assignee had no power to sell any debt of more than $100 except by itself, unless in case

of a sale of the whole estate; and therefore that the sale *en bloc* to the plaintiff of the uncollected debts of the insolvent did not pass to him any title to a debt of $324 due the insolvent by the defendants.

Rose, for appellant.

Murdoch, for respondent.

C. C. York.] [March 2.

CARROLL v. FITZGERALD.

Feme covert—Separate estate—Wife's earnings—C. S. U. C. Cap. 73.

The plaintiff, a married woman, who had separated from her husband, earned a sum of money by her own exertions, which she lent to the defendant. The husband had never made any claim to the money or to any of the plaintiff's earnings.

Held, affirming the judgment of the County Court, that the money was the separate property of the plaintiff by the acquiescence of the husband in her receiving it which amounted to a settlement; and that the C. S. U. C. cap. 73, which was in force when the money was lent, gave the husband no rights which he did not before possess, and did not abridge his power so to settle her earnings upon her, but that it operates only as between husband and wife to disable her from insisting that the earnings were not his.

Eddis, for appellant.

McMichael, Q. C., for respondent.

C. C. Wentworth.] [March 2.

MILLER v. HARVEY.

Insolvent Act of 1875, sec. 134—Note discounted by holder—Payment by insolvent to bank.

A. gave a note to the defendants on the 23rd November, 1878, which fell due on the 29th January, 1879. The defendants endorsed it to the Bank of Montreal and obtained its discount value. It was paid at maturity by one R. out of A's. moneys, and within 30 days thereafter A. became insolvent.

Held, reversing the judgment of the County Court that the defendants stood in a different position from that in which they would have been had they merely endorsed the note to the Bank as their agents for collection; for having endorsed the note to the Bank for value, the payment at maturity was a payment made to the Bank who were then the actual creditors of the insolvents.

C. C. Carleton.] [March 2.

CRAIG v. DILLON.

Liquidated damages.

The defendant agreed to pay to the plaintiff $200 as liquidated damages if certain loose stones and a partially constructed stone fence were not removed from the plaintiff's land at the times mentioned in the agreement.

Held, affirming the judgment of the County Court that the sum mentioned was not a penalty and that the plaintiff was entitled to receive the sum as liquidated damages on default.

Richards, Q. C., for appellant.

Bethune, Q. C., for respondent.

C. C. Oxford.] [March 2.

WILLSON v. BROWN *et al.*

Joint and several promissors—Principal and surety inter se—Notice of dishonor.

The defendants became parties to a joint and several promissory note made by one H. and themselves as the sureties of H.

Held, affirming the judgment of the County Court, that they came under a direct primary liability to pay at maturity; that in default of payment themselves their liability as sureties became absolute and they could not avail themselves of want of notice that their own note was not paid.

C. Robinson, Q. C., for appellant.

T. Ferguson, Q. C., for respondent.

C. C. York.] [March 2

IN RE WALKER, AN INSOLVENT.

Joint and separate creditors—Rights as to ranking.

In this case the evidence as to whether the assets were the joint assets of W. and M., or the separate assets only of W., being insufficient upon which to make an order as to how joint or separate creditors should rank, it was

Held, generally, on appeal from the County Court, that under section 88 of the Insolvent Act of 1875, if the dividend is derived wholly out of joint estate, the joint creditors alone can share until fully paid; if wholly out of separate estate it belongs wholly to separate creditors till they are paid; if partly out of each class of assets, it should go *pro rata* to each class of debts. The assignee being in a position to ascertain the character of the assets, it was left to him to adjust the dividends; and under the circumstances costs were allowed to all parties out of the estate.

M. Clark for appellant.

W. R. Mulock for respondent.

QUEEN'S BENCH.

IN BANCO—HILARY TERM.

NEILL, ADMINISTRATRIX v. THE UNION MUTUAL LIFE INSURANCE COMPANY.

Life policy—Overdue premium—Payment.

J. N. was insured with the defendants by a policy dated 8th May, 1877, on which quarterly payments were due on the 10th days of February, May, August, and November, in each year. The policy among others contained the following conditions:—"If any premium, etc., shall not be paid when due the consideration of this contract shall be deemed to have failed, and the company shall be released from liability, and the only evidence of payment shall be the receipt of the company, signed by the President or Secretary." "If for any reason the premium is received after it becomes due it is upon the express condition that the party is in good health, and of correct, sober, and temperate habits, otherwise the policy shall not be put in force, etc." "In case any note, cheque, or draft, given towards the payment of any premium, shall not be paid at maturity, this policy lapses in the same manner as upon the non-payment of the premium."

McN., the general agent of the company at Toronto, was in the habit of receiving payment of premiums after they were due, of which the company were aware, and did not disapprove. On 24th September, 1879, a cheque was given by the assured's firm to McN., with the understanding that it was to be held till there were funds, as he had often done formerly. It was several times presented and dishonored. On 8th October, McN.'s successor in office notified the assured that if the cheque were not paid at once the receipt would be returned to the company. On 21st October, in answer to S., the agent's messenger, assured's partner said that there were funds for the cheque at the bank; but as it was nearly three o'clock, S. said he would wait till the morning. That evening the assured was killed, and the cheque was therefore not presented, but was retained by the company. The plaintiff produced all the premium receipts, except that of 10th August, 1879.

The jury found that the defendant's agent had waived the payment of the premium due 10th August by receiving the cheque, and a verdict was entered for the plaintiff.

Held, (CAMERON J., *dissenting*), that though the defendants appeared willing up to the 21st October to receive payment and keep up the policy, yet there was no waiver of the terms of payment, and no existing agreement or anything binding them to extend the time for payment and to remain liable, and that the cheque was not taken in payment.

Per CAMERON J. The application by the defendant's agent on the 21st October for payment of the premium and the retention of the cheque, was equivalent to accepting a new cheque, which (there being funds therefor) would be payment.

Ferguson, Q. C., (with him, *G. H. Watson*), for plaintiff.

Robinson, Q.C., for the defendants.

MOFFATT v. THE RELIANCE MUTUAL LIFE ASSURANCE SOCIETY.

Life policy—Authority of general agent—Overdue premium—Promissory note.

J. M. was insured by a policy under which thirty days grace were allowed for payment of premiums. A lapsed policy might be renewed within a year upon proof of health, payment of arrears and a fine. S. was the resident secretary in Canada of the defendants, with the powers of a general manager. There was a local board of directors in Canada, but S. communicated directly with the board in England,

took his instructions from them, and laid before them monthly accounts, from which it could be ascertained whether premiums falling due the preceding month were unpaid. The assured, being unable to pay a premium about to fall due, wrote to S., asking him to take a note at three months. S. replied: "I am sorry you require three months' time, but I suppose it must be done, although it is against our rules. I shall have to take the responsibility myself. I enclose your draft for acceptance, which please return early." He also wrote that the company were very particular about overdue premiums. From this time S. accommodated the assured by taking notes, to which interest was added. On the 9th August, 1879, E., the cashier of defendants, wrote to the assured, acknowledging the receipt of his letter with a blank note which had been sent to S., to be filled up for the renewal of a note about to fall due, and saying that S. was absent from town, and that, as the two premiums of November, 1878, and May, 1879, were so long overdue, he should have to refer the matter to S., on his return; adding, "until the back premiums are paid, the Society is off the risk."

The death occurred on the 24th October 1879, at which time there were two notes outstanding—one for the premium due 30th November, 1878, dated 7th Febuary, 1879, at six months, which was unpaid; and one dated 21st June, 1879, at six months, for the premium which fell due on the 30th May, 1879, which was still current. After the death, the amount of these two notes was tendered to the defendants and refused.

The jury found that the notes were taken by defendants' agent as cash payments, that the taking of them was within his authority, that he had waived payment upon the dates the premiums were due; and a verdict was entered for the plaintiff.

Held (HAGARTY, C. J., *dissenting*), that the evidence showed that it was within the authority of the resident secretary to accept notes in payment of premiums, and there was nothing in evidence which would give notice to the assured of any want of such authority, and the verdict ought not to be disturbed.

Per ARMOUR, J. The defendants had become aware of the acceptance of notes and had ratified it.

VACATION COURT.

Armour, J.] [March 1.

IN RE MCCORMICK AND THE CORPORATION OF THE TOWNSHIP OF COLCHESTER SOUTH.

Proposed school-house—Submission to electors.

It appeared from the affidavit of the secretary and treasurer of a school section that at two regularly called meetings of the duly qualified electors of a school section, at which a chairman was appointed, proposals to purchase a site, build a school-house and borrow money therefor, were put by way of motion and carried, upon which a by-law was passed authorizing the issue of debentures to raise money for such purposes.

Held, that under 42 Vic. ch. 34, sec. 29, subsec. 3, this was a sufficient submission to and approval of the proposal by the duly qualified electors of the section, and a rule to quash was discharged.

C. Moss, for the application.

J. K. Kerr, Q. C., contra.

Cameron, J.] [March 8.

IN RE RUSHBROOM & STARR,

Award—Validity—Unsworn testimony.

Held, that under R. S. O., ch. 50, sec. 224, it is imperative that the testimony on an arbitration should be sworn testimony, unless dispensed with under a definite arrangement between the parties. Such agreement may be proved otherwise than by the submission, rule, or order of reference.

J. E. McDougall, for application.

McMichael, Q. C., contra.

Cameron, J.] [March 11.

THE QUEEN V. MCHOLME,

Arrest here, on telegram from England, for larceny—Extradition.

The prisoner was arrested and detained on a telegram from the chief constable at Liverpool saying that a warrant charging prisoner with conspiracy to defraud his creditors, and with committing larceny, was out against him, and that he had absconded to Canada. The prisoner was brought before the police magistrate at Toronto, who remanded him under a warrant

but the proceedings were removed into the Queen's Bench by *certiorari*, and a writ of *habeas corpus* was also granted. The detective who arrested McHolme swore that he believed a warrant for his arrest had been issued in England, but the warrant of arrest itself was not produced, nor of course was it endorsed by a Superior Court Judge here, as required by Imp. Act, 6, 7 Vict., cap. 34.

Held, that under these circumstances the prisoner must be discharged, as under the Imperial Act persons charged with committing treason or felony in Great Britain and Ireland could not be arrested in the Colonies (or *vice versa*), until the warrant of arrest issued in the country where offence was committed was produced and endorsed by a judge or other officer in the country wherein the prisoner is arrested.

The learned judge said, however, that under the Extradition Act offenders from other foreign countries could be arrested on information and warrant issued here, without any warrant from the foreign State; and that there might be a way under the law of this country for protecting the arrest, but he had no right to assume that a warrant had been issued in England until the warrant itself was produced and endorsed.

Fenton, for the Crown.

Murphy, for the prisoner.

COMMON LAW CHAMBERS.

Mr. Dalton, Q. C.] [Feb. 17.

Osler, J.]

LOUNT v. CANADA FARMERS' INS. CO.

Execution—Mutual Insurance Co.—R. S. O. ch. 161, sec 61.

Under R. S. O. ch. 161 sec. 61, writs of execution against a Mutual Insurance Company cannot be issued until after the lapse of three months from the recovery of judgment.

Held, that this section applies equally in the case of a policy issued on the cash principle, and of one upon the premium note system.

Osler, J.] [Feb. 18.

POWITT v. FRASER.

Arrest—Attachment—Costs—R. S. O. ch. 50, sec. 343.

Defendant was arrested and held to bail for a debt alleged by plaintiff to be $704. As to $80 of this, plaintiff had no reasonable ground for believing defendant to be liable, and he abandoned it at the trial.

Held, that defendant was entitled to tax his costs of defence against the plaintiff under R. S. O. ch. 50, sec. 343.

Osler, J.] [March 1.

REGINA EX REL. MITCHELL v. DAVIDSON.

Quo warranto—Disclaimer—Costs.

Defendant admitted that he was disqualified from holding the office of councillor, and before the issue of the writ of *quo warranto*, sent the following memorandum to the council:—"Palmerston, Feby. 7, '81. To the Mayor and Council of town of Palmerston: Gentlemen, I beg to disclaim my seat at the council board. (Signed) G. S. Davidson."

Held, that the above disclaimer was not sufficient to disentitle the relator to costs.

CHANCERY.

Spragge, C.] [Feb. 17.

RIPLEY v. RIPLEY.

Dower—Election—Waiver.

The testator bequeathed to his widow for life, an annuity of $60, payable by his son, John Ripley, his heirs, &c., together with all and singular his household furniture, &c., and in the event of his widow remaining in the dwelling-house on the premises after his decease, she was to have the free use of certain rooms therein; and in case of sickness while there, his said son was to see that she had proper medical attendance and nursing; and charged this annuity and the other bequests upon the land in question, and devised the same so burthened to his said son, the defendant.

The widow filed her bill for payment of the annuity alone, not claiming any lien on the

land in respect of the charges created in her favor by the will or dower. The usual decree for payment or, in default, sale, was made with reference to the Master at Hamilton, under which the land was sold free from dower and other charges, and the purchase money was paid into court. In the Master's Office the widow made no claim, either for dower or in respect of the other charges; but she afterwards presented a petition to have it declared that she was entitled to dower in the land and to compensation in respect of the other bequests above set out; and prayed that a sum in gross out of the money in court should be paid to her in lieu of dower, and a proper sum allowed by way of compensation for the other benefits.

Held, following *Murphy* v. *Murphy*, 25 Grant 81, that the widow was not put to her election by the will, and that she was entitled to have a proper sum paid to her for dower out of the purchase money in court; but that by her acquiescing in the sale of the land, and by her laches she had waived her right to any compensation for the loss of the other benefits bequeathed to her.

Black, for petitioner.

R. Martin, Q. C., and *Watson*, for subsequent incumbrancers.

Spragge, C.] [Feb. 17.

NELLES (Assignee), v. BANK OF MONTREAL.

Insolvent Act of 1875, sec. 134—Payment in contemplation of insolvency.

Held, under the circumstances appearing in the case that certain transactions which took place between the defendants and K., an insolvent, shortly before the latter absconded, were not entered upon in contemplation of insolvency, but were attempts made in good faith to enable K. to carry on his business; and that the defendant's manager was not aware of the insolvent condition of K.

Boyd, Q. C., for plaintiff.

Moss, for defendant.

Blake V. C.] [Feb. 26.

HILL v. MANUFACTURERS' & MERCANTILE INS. CO.

Mutual Insurance Company—Receiver—Assessment on premium notes.

Where an application was made to the Court to add the persons who had signed premium notes as parties in the Master's office, and to direct the Master to assess the amounts due upon the notes, and to order payment of the same to the Receiver from time to time, it was shown that the directors had not made any assessments upon the notes pursuant to R. S. O. cap. 161, secs. 45 *et seq.*

Held, that as the liability attached only upon such assessment by the Directors, the Court could not add to, or alter the liability of the parties who had made the notes by referring it to the Master or a Receiver to do that which the Directors only could do, clause 75 of 36 Vict. cap. 44, which gave power to a Receiver to do this, having been omitted from the Statute on revision.

Duff, for plaintiff and Receiver.

B. B. Osler, Q. C., for defendant.

Lazier (of Hamilton), for some of the makers of premium notes proposed to be added.

Blake V. C.] [Feb. 21

SUMMERVILLE v. RAE.

Preferential conveyance—Bona fides—Absolute deed security only.

The defendant H. H. obtained from his co-defendant H. R., who was indebted to him, a deed of land in order to secure his debt, which conveyance was attacked by the plaintiff who had obtained an execution against H. R., after the delivery of the deed, on the ground that it was a fraudulent preference. It appeared in the evidence, however, that the grantee claimed to hold the land only as security for the amount due him:

Held, that the conveyance was *bona fide* and not to defraud creditors; that an account should be taken of the amount due H. H., and that the land should be sold, and the proceeds applied first in payment of the amount due to H. H. for principal, interest and costs, and the balance applied as in ordinary fraudulent con-

veyance cases, and for these purposes the usual reference to the master was directed.

Harding for plaintiff.

Idington, Q.C., *and McMillan* for defendant.

Blake V. C.] [Feb. 26

MCARTHUR V. PRETTIE.

Appeal from Master—Taking further evidence

On an appeal from the Master which turned upon the credibility and weight of evidence, the Court, though not satisfied as to the actual facts of the case, could not say that the Master had erred in his finding and therefore dismissed the appeal with costs; giving at the same time liberty to the appellant to examine the witnesses again at the next sittings before the Judge who had heard the appeal, in order to enable him to dispose of the matter with greater satisfaction to himself, in which case he reserved the costs till after such evidence was taken.

Hodgins, Q. C., for plaintiff.

Boyd, Q. C., for defendant.

Proudfoot V. C.] [March 9.

WEBSTER V. LEYS.

Demurrer—Style of cause—Married women—Administration suit.

In a bill the style of cause named several females as being severally wives of their respective husbands, but the stating part of the bill did not allege that they were married; a demurrer on the ground that their husbands were not named as parties was overruled with costs.

The bill shewed that the testator had appointed four executors, three of whom had died, but stated that those so dying had never received any portion of the assets. In a suit for the administration of the estate a demurrer *ore tenus* on the ground that the representatives of such deceased executors should be parties was also overruled with costs.

Boyd, Q. C., and *Black* for plaintiff.

Moss, and *Kingstone*, for defendant.

Proudfoot, V. C.] [March 9.

MCGARRY V. THOMPSON.

Will, construction of—Widow—Election—Dower—Maintenance—Conversion of realty into personalty.

A testator gave and devised all his real and personal estate to trustees to sell the realty and collect and get in the personalty, and, after paying debts, &c., to invest the proceeds of sale in their names upon trust, to pay annual incomes to his two sons in equal moieties—they maintaining their mother during her life—and after the death of each of said sons the trustees were to hold one moiety of the trust moneys upon trust to pay and divide and transfer same between and amongst such of their children as should be living at his decease, and the issue of such children as should be dead, as tenants in common, in course of distribution, according to the stocks, and not to the number of individual objects, and so that the issue of any deceased child should take, by way of substitution amongst them, their share or respective shares only, which the deceased parent or parents would have taken.

Held, (1), that the widow was not put to her election, but was entitled to dower as well as to the provision made for her by the will; and it being alleged that the sons had not provided for her maintenance, a declaration was made that she was entitled to such maintenance, and a reference was directed to find what would be a proper sum for that purpose; (2), that a complete conversion was effected by the trust for sale in this will, and the interests of the sons were to be ascertained, as if the will consisted of personal estate only; and that, therefore, the sons took only life estates therein, and one of the sons having died without children, there was an intestacy as to his share, subject, however, to a proportion of the charge for maintenance of the widow.

J. H. McDonald, for plaintiff.

Arnoldi, for defendant.

Proudfoot, V. C.] [March 9.

VANKOUGHNET V. DENISON.

Demurrer—Covenant against building—Injunction.

The owner of real estate in effecting a sale of a portion thereof covenanted with the purchaser that he would retain a certain square

unbuilt upon, except one residence with the necessary outbuildings including porter's lodge; the purchaser on his part covenanting that he or his assigns would not allow any business of a public nature, such as a tavern, requiring a license to make it allowable in the eye of the law to be carried on upon the portion conveyed to him. A bill was filed alleging that the vendor and the defendant E. M., who resided with him, were in violation of the covenant erecting a house upon such square not within the exception in the covenant. The bill set forth the dimensions of the square and alleged that the same was particularly shewn and delineated on the map of the city of Toronto published in 1857—and was situated between certain named streets.

Held,—on demurrer for want of equity—that the square was pointed out with sufficient distinctness, and the fact that it comprised about six acres of land while the portion conveyed to the purchaser was about ¼ of an acre only, was not such a ground of hardship as would prevent the Court from interfering by injunction to restrain the breach of covenant, and E. M. being joined with the vendor in the erection of the house, she could not be heard to say she had not notice of the covenant—and the demurrer was overruled with costs.

Maclennan, Q. C., for plaintiff.
Black, for defendant Denison.
Delamere for defendant Wynn.

Proudfoot, V. C.] [March 9.

SIEVEWRIGHT V. LEYS.

Will, construction of—Conversion of realty—Demurrer—Chose in action—Married woman.

The bill for the administration of the estate of G. E. alleged that G. had appointed his brother J. E. his executor, and devised to him all his estate upon trust for the benefit of the testator's wife and children as to J. should seem best: the will giving J. power to sell the realty. J. E. proved the will of G., and shortly after his death made his own will by which he purported to dispose of G.'s estate, the validity of which the bill impugned, and C. S. D. a married daughter of G. was made a defendant, the bill alleging her to be the wife of S. H. D. J. E. made an appointment under G.'s will of a certain portion of the estate in favor of C. S. D. The defendant demurred on the ground that S. H. D. should have been a party.

Held,—That the interest of C. S. D. was merely a chose in action not reduced into possession by her husband. in respect of which she might be sued as a *feme sole*, and therefore the demurrer was overruled with costs following *Lawson* v. *Laidlaw* 3 App. R. 77. The bill distinctly charged that the defendant had misapplied the moneys of the estate of G., mixing them with his own and employing them for his own purposes a demurrer *ore tenus* that G.'s estate was not properly represented, on the ground that one executor could not represent the estates of both G. and J., was also overruled with costs; for although during the progress of the cause it might become necessary to have different persons represent the two estates that did not constitute a ground of demurrer.

Boyd, Q. C., and *Black* for plaintiff.
Moss and *Kingsford* for defendant.

Proudfoot, V. C.] [March 11.

SMITH V. PETERSVILLE.

Municipal Council—Resignation of candidate after election—Notice of resignation of seat.

Sect. 195 of the Municipal Act provides that the effect of a party disclaiming the office to which he has been elected shall be to give the same to the candidate having the next highest number of votes.

Held, that this meant the candidate having such number of votes who has not been elected to the Council; therefore where the plaintiff was the candidate who was the fourth in that order, the three highest on the list having been declared elected Councillors for the village of Petersville, and one at head of the poll resigned his seat, an injunction was granted to restrain the Reeve and Councillors of the village from preventing the plaintiff entering upon and discharging the duties of such office.

The notice of the party resigning the office stated that he resigned his seat in the Council.

Held, sufficient, although the Act requires notice of a resignation of the "Office" to be given; and that the plaintiff was entitled to his costs to be paid by the defendants.

Boyd, Q.C., for plaintiff.

Hodgins, Q. C., for the municipality of Petersville and the Reeve.

Bartram for defendant Evans.

Proudfoot, V. C.] [March 11.

STEVENSON v. STEVENSON.

Will, construction of—Land subject to mortgage—Right to redeem given by testator—Costs.

The testator was seized of certain lands which were subject to incumbrances, and by his will directed the same to be sold if his sons in succession should not redeem. One of the sons R. to whom the first privilege of redeeming was given, availed himself thereof and redeemed the property, which was subject to certain charges imposed by the will, in addition to the incumbrances.

Held, that the right to redeem was in effect a right to purchase as the mortgages and charges created by the will amounted to about as much as the land was worth; and that R. had acquired a good title free from any claim of his brothers, and was entitled to recover his costs, not out of estate of the testator, but from the plaintiffs personally.

Cassels, for the plaintiffs.

Kingsford, for the defendants The Freehold Loan and Savings Company.

Moss, for the other defendants.

Proudfoot, V.C,] [March 11.

IN RE JOHN MCDONALD'S WILL.

Will, construction of—Mortmain—Costs.

A testator made his will, and within three weeks thereafter died, having by his will directed his lands to be sold, and out of the proceeds gave $2,000 to his widow in lieu of dower, and further directed that "all moneys then remaining in the hands of my executors shall be divided between the following funds: naming five different charities in connection with the Canada Presbyterian church—"such money to be divided in which ever way my executors may think best."

Held, that the bequests to the charities were void under the Mortmain Acts; and there being no residuary clause the bequests so failing to take effect went to the heirs-at-law, not to the next of kin of the testator: costs of all parties to be paid out of the estate.

Fraser, for petitioners.

Roaf, for widow of testator.

Meredith & Clarke, for other legatees.

Proudfoot, V. C] [March 11.

SCOTT V. DUNCAN.

Will, construction of—Estate tail—Vested interest.

The testator directed all his lands to be sold by public auction or private sale, and proceeds to be retained by his executors till his youngest surviving child should attain the age of twenty-one, when the amount was to be divided amongst all the surviving children share and share alike; but in the event of either of his children dying without issue before the youngest surviving child should attain twenty-one, the share of the one so dying should go to the survivors.

Held, that these words did not create an estate tail or *quasi* entail—and that the shares of the legatees were vested.

Hoskin, Q. C., and *Crickmore*, for plaintiffs.

Cameron and *Ewart*, for defendants.

The Chancellor] [March 12

MCGEE v. CAMPBELL.

Insolvency—Concealment of Assets.

The omission by an insolvent from his schedule of assets, of any property or stocks, in order to render him liable to the consequences provided by the 50th and 140th Sections of the Insolvent Act, must be shown to have been so omitted with a fraudulent intent.

A firm consisting of three members having become insolvent, the members thereof procured the usual discharge, which, so far as C. one of the members was concerned, was impeached by a creditor of the firm, on the ground that C. had omitted from his schedule certain railway shares which it appeared had been allotted to C. at the original organization of the company in the same manner as shares were allotted to other persons, and marked paid up shares, no money consideration however having been paid by the allottees, and no scrip issued for the shares, such persons being appointed directors

of the undertaking and receiving no other compensation for their services. The shares however had not any money value whatever, and C. in his evidence swore that he had not thought of this stock when making up his schedule of assets, so utterly valueless was it. The Court [SPRAGGE C.] being of opinion that the excuse offered by C. was not untrue *held* that there was no fraudulent or even wilful omission in respect of such stock.

Prior to the time of C. making up his schedule he had, during the absence of the President of the road in England for about a year endeavoring to raise funds for carrying on the undertaking, acted as Vice-President and rendered services for which he hoped at some time to receive some compensation, but no promise, express or implied, had been made to him; subsequently, however, and after C. had applied for his discharge, a resolution was passed, granting him a sum of $5,000, which was given more as a gratuity, and with a view of relieving him in his distress, than as a payment of a debt, and C. was unaware of the resolution of the Board granting this money until he had obtained his discharge.

Held, that, under the circumstances, it could not be considered there was in strictness any debt due to C.; and in any event that the non-insertion of the money in the schedule was not a fraudulent concealment within the meaning of the Act.

At the date of the insolvency a large number of shares of another railway was held by C. as trustee, such shares being of actual pecuniary value to C. as enabling him to be appointed a Director of the company, and for some years he received a salary as Director; and the stock was shown to have been worth about from 7 to 15 per cent, not on account of any anticipated dividends, but as a qualification for the Directorate. At the date of the insolvency C., according to the arrangement with the owners of this stock was bound at any time he might be called upon to re-transfer it, in consequence of his failure to "give value" to it, but he was not called upon to re-transfer, nor had he been at the time the cause was heard called upon to do so; and he stated in his evidence that he had been advised he could not properly insert this stock in his schedule of assets. Subsequently to the date of the deed of composition and discharge and the filing of the certificate of the assignee, but eight days prior to the order of confirmation by the judge, C. acquired as his own property a portion of this stock.

Held, that his omission to bring such after acquired stock in by a subsequent schedule of assets was not a case of fraudulent concealment; and the bill by reason of the serious nature of the charges which the plaintiff must have established before he could succeed was therefore dismissed with costs.

REHEARING TERM.

CAMERON v. WELLINGTON GREY & BRUCE RAILWAY COMPANY.

Farm crossings—Parol agreement—"Make and maintain"—Construction of.

The plaintiff conveyed a right of way over his land to the defendants, and the deed contained a stipulation that "The company should make and maintain a farm crossing, with gates at the present farm lane." R., the company's engineer, treated for the conveyance, but had no power to agree for a second crossing. It was said, however, that he had promised, if he should find a second crossing necessary, he would, so far as in him lay, get it made, and the deed was executed upon this understanding.

Held, reversing the decree of PROUDFOOT, V. C., 23 Grant 95, that the defendants could not be compelled to make a second crossing for use in winter, the existing one being then impassable, and that upon the construction of the words above set forth, they were bound to continue the crossing, not to close it up or impair it, or alter its character as a farm crossing, but were not obliged to keep it free from snow.

PROUDFOOT, V. C., dissented.

Boyd, Q.C., for plaintiff.

Bethune, Q.C., for defendants.

IN RE LAWS, LAWS v. LAWS.

Husband and Wife—Wife's chose in action—Reduction into possession—Evidence—Statute of Limitations.

The widow of the intestate claimed against his estate for a sum of $700, which she alleged he had borrowed from her after their marriage, and some years before his death, for the purpose

of buying stock in trade. The money was deposited in a bank at the time of the marriage, which took place before the C. S. U. C., cap. 73. The only evidence offered in corroboration of the claimant was that of one B., who said "he (Laws) told me he had got $600 or $700 from his wife. She had a little money. He said he had paid that money for the things he had in the store. This was after he had bought L. out. * * He said his wife had helped him to $600 or $700 * * I understood he had used the money to buy out the business."

Held, affirming the order of the Chancellor, reversing the finding of the Master, that she could not recover.

Per BLAKE, V. C. The evidence of the widow was not sufficiently corroborated.

Per PROUDFOOT, V. C. The evidence that the chose in action was originally hers, and that she gave it to her husband, was sufficiently corroborated, but the transaction having taken place before the C. S. U. C., cap. 73, under which she had the right to assert her proprietorship as against her husband, and as incident thereto, the right to bring a suit against him; and as to any such proceedings the Statute of Limitations would be a bar, her remedy was gone.

F. Beverley Robertson, for widow.

Laidlaw for defendant.

KASTNER V. BEADLE.

Right of way—Obstruction of.

An arrangement made between the plaintiff and B., whereby the latter "was allowed to go through" the plaintiff's land, was superseded by an arrangement whereby, in consideration of 150 cords of wood and the making of the road by B., the latter was to have a right of way through the plaintiff's land. The plaintiff was to erect and keep up the gate at one end, and B. to keep up the gate at the other end, of the road. The wood was delivered, and the road made, according to the terms of the agreement. The plaintiff subsequently erected three gates along the course of the right of way, which were not necessary for the enjoyment of the land. The bill was filed to restrain the defendant from using the way except upon the terms of shutting those three gates when going through.

Held, reversing the decree of the Chancellor, that the right of way having been purchased when there were but two gates, the plaintiff had no right to fetter the enjoyment of the way by adding additional gates.

Boyd, Q.C., for plaintiff.

Idington, Q.C., for defendant.

EXCHANGE BANK V. SPRINGER.

THE SAME V. BARNES.

Parties—Principal and surety—Non-joinder of principal.

One M., and the defendants as his sureties, executed a bond conditioned for the good behavior of M., a clerk of the plaintiff's at Montreal. The bond was executed at Hamilton by the defendants who were resident there. M. made default at Montreal and absconded. Proceedings were then taken against the sureties, without joining M.

Held, affirming the order of PROUDFOOT, V.C., that the plaintiffs could not proceed against the sureties alone, if they required the joinder of the principal in order that they might have their remedy over against him.

Per SPRAGGE, C. Though the breach occurred in Montreal, and there was no cause of action till default, yet there was a potential equity in the defendants, co-eval with the execution of the bond, which became a right of suit on the default of M.; and there was also an implied contract on the part of M., upon execution of the bond, to repay to his sureties any moneys that they might have to pay by reason of his default.

Per BLAKE, V. C. The plaintiffs having filed their bill in Ontario, must be taken to admit that the Court has jurisdiction in respect of the matters therein embraced; and the practice of the court requiring it, and a method having been provided for service of process out of the jurisdiction, the plaintiffs were bound to follow the practice if objection taken.

Bethune, Q.C., and *E. G. Patterson*, for plaintiffs.

Boyd, Q.C., and *MacKelcan*, Q.C., for defendant Springer.

R. Martin, Q.C., for defendant Barnes.

CORRESPONDENCE.

Professional Ethics.

To the Editor of the CANADA LAW JOURNAL.

SIR,—When a member of the profession so far forgets the dignity of the position he holds, and the code of honor existing amongst professional men, as to be guilty of conduct such as the following circumstances disclose, he deserves exposure:

The following are the facts:—A gentleman in Buffalo, a client of a Toronto firm, had a claim for an account against a customer in Brantford. The account was placed in the hands of the Toronto firm for collection, and a correspondence took place with the debtor which resulted in a short extension of time for payment. When the time for payment arrived, the debtor somehow or other fell into the hands of a Brantford barrister, and instead of a remittance being made to the solicitors in Toronto the aforesaid barrister sent his cheque direct to their client in Buffalo and added to his letter the following:—"If you want any accounts collected in Western Ontario you can find out by inquiries at ————'s, Buffalo, or Messrs. ———————— wall paper manufacturers, Buffalo, whether or not you are likely to meet with satisfactory returns by sending them direct to me. By sending accounts to Toronto you incur double the expense, the Toronto lawyer having to employ an agent here to sue it and of course he must charge himself a small morsel.

"Faithfully yours,
"X————."

I spare his several initials and call him "X," preferring to leave him as the *unknown quantity*. At the same time was posted to the Toronto firm a post card purporting to be written by the debtor, but in the *handwriting* of the "unknown quantity," informing them of a remittance to Buffalo by the *debtor* direct. Comment on such a proceeding is useless.

Yours, etc.,
A. B.

Toronto, 1st March, 1881.

[The Discipline Committee will apparently have enough to do under the recent Act. Such things as the above will perhaps convince even Mr. Meredith, who opposed the bill, of the necessity of giving ample powers to the Benchers in such matters.—ED. C. L. J.]

To the Editor of the CANADA LAW JOURNAL.

DEAR SIR,—Enclosed I send you a clipping from the *Northern Advance*, published in this town, which will show you to what length our post-master-pettifogger will go.

Yours truly,
"SUBSCRIBER."

Barrie, Feb. 14, 1881.

MORTGAGE SALE.—Under and by virtue of a Power of Sale contained in a certain mortgage, which will be produced at the time of sale, and upon which default has been made, there will be sold at, &c., &c. Terms—One-tenth of the purchase money to be paid down on the day of sale; for balance, terms made known on the day of sale. For further particulars application to be made to JAMES EDWARDS, Conveyancer, Barrie, Vendor's Agent."

[This person is doubtless thoroughly versed in real property law and his services are of course much sought after as a "conveyancer," and as a "Vendor's Agent." This being so it is a pity he should be cramped by any remembrance of the fact that he occupies an important position in the public service. So that this difficulty may be remedied as far as possible, (and doubtless his modesty stands in his way) we shall send a copy of this journal to the Postmaster General, so that, being aware of the facts, he may be graciously pleased to apply the appropriate remedy. One very efficient and summary one occurs to us, and we trust may also occur to him.—ED. C. L. J.]

Unlicensed Conveyancers.

Editor LAW JOURNAL, *Toronto*,

MY DEAR SIR,—As it appears the Legislature will not protect us in our legitimate calling, I would suggest that country practitioners throughout Ontario send circulars to the farmers and others in their respective neighborhoods, showing the danger they incur in doing business with incompetent men and their legal responsibility for errors.

This is our only possible chance to secure even a measure of protection, and I suppose

the Law Society could not hold us guilty of unprofessional conduct in doing so, as conveyancing is evidently considered by them as well as our law makers as no longer a branch of the legal profession.

Yours truly, LEX.

26th Feb'y, 1881.

[As the subject-matter referred to above has now been brought formally before the Benchers by one of their number we shall refrain from comment at present.—ED. C. L. J.]

To the Editor of the LAW JOURNAL :

SIR,—As a Law Student I take the liberty of troubling you with the following question and request an answer through the columns of the LAW JOURNAL. I have sought for the information from several barristers, most of whom differ in their opinions : A., a tenant in fee simple of certain lands, devises them "to B., and his *heirs* except his *grandfather*." What estate does B. take ?

Yours, etc. J. A. M.

February, 1881.

[Our off-hand impression is that B. takes an estate in fee simple, the exception being void for repugnance. Perhaps some of our young friends will look up the point and give J. A. M. the benefit of their investigations.—ED. L. J.]

TO CORRESPONDENTS.

F. G. M.—The subjects required of candidates for the Primary Examinations will be found in the last page of the LAW JOURNAL You will there also see that these examinations can only be dispensed with in two cases : (1) graduates of Universities and (2) students of Universities who can present a certificate of having passed an examination in the prescribed subjects within four years of their application. The next primary examinations will begin on the 3rd of May next.

GENERAL RULE OF THE COURT OF COMMON PLEAS.—It has been ordered by Rule of Court issued on 11th inst., that rules Nos. 13 and 14 of the General Rules for the trial of controverted elections of members of the House of Commons made as of Michaelmas Term, 42nd Vic. H. T. 1878, be and the same are hereby rescinded.

Law Society of Upper Canada.

OSGOODE HALL.

HILARY TERM, 44TH VICT.

During this Term the following gentlemen were called to the Bar.

The names are arranged in the order in which they entered the Society, and not in the order of merit.

George A. Skinner, John Philpot Curran, Reginald Boultbee, Harris Buchanan, Goodwin Gibson, William James Thorley Dickson, James Alexander Allan, Walter Alexander Wilkes, James Harley, William White, Daniel Erastus Sheppard, Wallace Nesbitt, James B. McKillop, Colin Campbell, Phillip Henry Drayton, Thomas C. L. Armstrong, John Doherty, Alexander Dawson, Thomas Dickie Cumberland, J. Gordon Jones.

The following gentlemen were admitted into the Society as Students-at-Law.

GRADUATE.

Henry Gordon Mackenzie.

MATRICULANTS OF UNIVERSITIES.

James M. Knowlson, Edwin Mowat Henry, Edward Wilson Boyd, Reginald Rudgerd Boulton, William Arthur Campbell, Arthur Luke Rundle, Frederick Laing Fraser.

JUNIOR CLASS.

James F. Williamson, John Thacker, Edmund Walker Head Van Allen, Robert George Code, William Robert Smyth, William Nassau Irwin, Edward Herbert Ambrose, George Edgar Martin, John Smith Meek, Archibald McKechnie, William Henry Tweedale, Thomas Francis Johnson, Sidney Chilton Mewburn, George Hutchison Esten, William Lawrence Leslie.

The following gentlemen passed their examination as Articled Clerks.

Albert Wesley Benjamin, John Hambly, James Joseph Berry.

RULES

As to Books and Subjects for Examination, as varied in Hilary Term, 1880.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and

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DIARY FOR APRIL.

3. Sun....5th Sunday in Lent.
4. Mon...County Court Terms begin, County Court sitt. without jury (ex. York) begin.
5. Tues...Canada discovered, 1499.
8. Fri.....Supreme Court Act assented to, 1875.
9. Sat.....County Court Terms end.
10. Sun.....6th Sunday in Lent.
17. Sun.....Easter Sunday.
22. Fri.....Beaconsfield Ministry resigned.
23. Sat.....St. George's Day.
24. Sun.....Low Sunday.
25. Mon...St. Mark
26. Tues....2nd Intermediate Exam.
27. Wed...2nd Intermediate Exam.
28. Thurs..1st Intermediate Exam.
29. Fri.....1st Intermediate Exam.

TORONTO, APRIL 1st, 1881.

OWING to the number of cases in the "Notes of Cases," we are compelled to hold over much interesting matter until next issue.

William Wilkinson, Jr., Q. C., has been appointed Judge of the County Court for the Counties of Northumberland and Gloucester, and Restigouche, in the room of Hon. Edward Williston, resigned.

The vacancies on the Ontario Bench, actual and possible, have not yet been filled; this cannot, however, long continue. Various suggestions have been made. We would add another which we believe represents the general feeling of the Bar. It is that Mr. Dalton should be promoted to a seat on the Superior Court Bench—a sound lawyer with a judicial turn of mind, enlarged and liberal views, sound common sense, and great experience, he would seem peculiarly fitted for assisting in the working out and development of our new system of practice.

ATTENTION is called to the general rule of the Supreme Court of Canada to be found elsewhere.

Under its provisions the delays for taking the several steps required to mature an appeal for hearing are considerably shortened. The case is to be filed 20 clear days before the first day of next session, the notice of hearing given and factums filed at least 15 days before, and the appeal inscribed at least 14 days before. For instance, no appeal can be heard at the session beginning on the 3rd May next, unless the *case* be filed not later than the 12th April, notice of hearing given and factums deposited not later than the 16th of April, and the appeal duly inscribed on the 18th of April. The object of requiring the *case* to be filed so many days before the factums are deposited is to give an opportunity of referring to line and page of the printed *case* in the factums, when such reference is considered desirable. In some factums considerable portions of the evidence have been printed. This the registrar, we understand, has refused to tax when a mere reference to line and page would have been sufficient.

It will be as well to bear in mind that the obligation still rests upon an appellant, under rule 5, of filing his *case* within one month after the security required by the Act shall have been allowed, and that a *case* is not *filed* until the fee of $10 required on entering every appeal be paid to the registrar.

The new rule does not apply to Election Appeals or Criminal Appeals.

In framing the rule the judges have shewn every desire to consider the convenience of the Bar, and we believe the amendments will meet with general approval.

LEGAL LEGISLATION.

In the Dominion Legislature the Statute book, so far as the practising lawyer is concerned, is remarkable for what is *not* there, for which we tender our hearty thanks. The only acts worth referring to at present are, one "to amend the Insolvent Act of 1875 and amending Acts," which repeals sections 15 and 15 of 40 Vict., cap. 41, and revives sec. 58 of the act of 1875, thus bringing back the law of that date, as to the circumstances under which an insolvent can obtain his discharge; also a carefully drawn act establishing the rule of decision in the North-West Territories.

In the Local Legislature the year 1881 will be remarkable for the most important act that has been passed (so far as we are concerned) since the Common Law Procedure Act. Several other important changes in the law have also been made, which it is hardly worth dilating upon, as the acts as passed are given *in extenso* in a supplement to the *Ontario Gazette*, already in hands of most of our readers. These statutes may be shortly summarised as—Acts respecting Interpleader; to regulate the fees of Deputy Clerks of the Crown, and County Court cases, in certain cases, &c; to make provision for the administration of justice in the new county of Dufferin; to amend the Registry Act as to the execution of discharges of mortgages, and to provide further for the release of dower by married women; in reference to chattel mortgages; respecting the appointment of guardians for infants, and lastly, an act to extend the powers of the Law Society of Upper Canada.

ELECTION OF BENCHERS.

The quinquennial disturbance of the serene atmosphere of Osgoode Hall is again upon us. The principle involved in the present mode of selecting Benchers was not originally to our taste, but it cannot be said that it has made any marked difference in the *personnel* of the Bench. There has been much discussion as to those who should be elected on this occasion, the lay press has been filled with letters on the same subject, and various lists have been distributed. A great deal also has been said and written about making an election from the Junior Bar, as such. It is a pity that any issue of this sort should have been raised. The real evil has, we fear, been to a great extent lost sight of in a useless wrangle about the words Senior and Junior. It would be as absurd, (or even more so, as "vidth give visdom,") to select a man simply because he is a junior as it would be to do so because he is a senior. The evil we speak of, and one which we have never ceased urging, is the claims of the profession to protection from an army of unprofessional invaders, both in the matter of Division Court business and as to conveyancing: and we again repeat that these are the main points to which attention should have been directed. We trust that those who wish to see justice done in the premises are keeping this matter prominently in view without reference to class distinctions.

We are glad to know that though late in their official life, and after much urging through our columns and from individual sufferers, the present Benchers awoke to the necessities of the case, and passed a resolution from which we hope to see good fruit. This step, however, must be followed up with vigor. The profession is not as a class alive to its own interests. We move also slowly, but we think *surely* as well; and when once we begin to realize the enormous power we can wield, we shall probably see that things are put right. In the meantime we have great faith in the good sense of the profession, and have good hopes that the selection now to be made will show that an honest independent vote has been given, to result in a choice free from sectional feeling, false sentiment, or the curse of party politics

The following is a list of the present Benchers: H. C. R. Becher, Q. C; T. M. Benson; James Bethune, Q.C.; B. M. Britton, Q. C.; Hector Cameron, Q. C.; John Crickmore; Thos. Ferguson, Q. C.; A. S. Hardy, Q. C.; J. A. Henderson, Q. C.; John Hoskin, Q. C.; Æ. Irving, Q.C.; J. K. Kerr, Q. C.; Robert Lees, Q. C.; Andrew Lemon, Q.C.; D'Alton McCarthy, Q.C.; F. MacKelcan, Q. C.; D. McMichael, Q.C.; James Maclennan, Q. C.; E. Martin, Q.C.; W. R. Meredith, Q. C.; T. B. Pardee, Q.C.; D. B. Read, Q. C.; S. Richards, Q. C.; Thomas Robertson, Q.C.; L. W. Smith, D. C. L.; Alex. Leith, Q. C.; B. B. Osler, Q.C.; James Beaty, Q.C.; and Chas. Moss.

The ballot papers are to be sent in not later than the 6th April.

MORTGAGEE IN POSSESSION.

Readers of the LAW JOURNAL may remember our notice of a touching epitaph commemorative of the woes of a mortgagee in possession, who preferred "the grave and death's dark gate" to a longer continuance of his unhappy estate. Those who still survive under so heavy a burden may find some slight consolation in a recent decision of the Master of the Rolls in *The Union Bank of London* v. *Ingram* reported in the January number of the *Law Journal* Reports. In that case the plaintiffs, who were second mortgagees, claimed redemption against the defendant, a mortgagee in possession, in whose mortgage there was a proviso for the acceptance of a lower rate of interest in the event of punctual payment by the mortgagor. Default having been made, the mortgagee entered into possession and received punctually rents equal in amount to the higher rate of interest. It was claimed by the plaintiffs on the authority of *Stains* v. *Banks*, 9 Jur. (N. S.), 1049, that in taking the account the defendant should only be allowed interest at the lower rate. Fortunately for the defendant it happened that Sir Geo. Jessel had been engaged as counsel in *Stains* v. *Banks*, and had an impression that the reported decision had been over-ruled. A reference to the registrar's book shewed that the memory of the learned judge was not at fault, and that in addition to his other calamities, the mortgagee in possession had false witness borne against him by the printed report. The Master of the Roll, in following the final decision in *Stains* v. *Banks*, expressed his entire concurrence with its principle, considering, to quote the language of the English *Law Journal*, "that it would be unjust and a mockery, to treat a mortgagee, who has been forced to undertake all the responsibilities and dangers of an entry into possession, as if he were a lender who had received the interest on his loan punctually to the very day."

DIVISION COURT JURISDICTION.

[COMMUNICATED.]

Small fear there is of lawyers starving so long as we have a body of men in the halls of our Legislature who are burning with desire to immortalize themselves by making changes in laws as to which very few of them understand either the old law, the mischief or the remedy—or, in fact, whether there is a mischief which requires a remedy. Division Courts being courts for the people, are peculiarly subject to this "worrying" process. The doctor has then to be called in in the shape of a judge, aided by a large staff of nurses in the shape of lawyers, and the consequence often is that the last state of the litigant public is worse than the first.

The enactment that has been most before the profession lately in the way spoken of is sub-section 3 of section 2 of the Act of 1880. It provides that Division Courts shall have jurisdiction in "all claims for the recovery of a debt or money demand, the amount or balance of which does not exceed

$200, and the amount, or original amount, of the claim is ascertained by the signature of the defendant," &c. The construction to be placed upon these words comes up in a variety of ways. One is as to the taxation of costs.

Some clerks of County Courts tax plaintiffs full costs in cases where the debt claimed exceeds $100 and does not exceed $200 on bills of exchange and promissory notes where the amount is not *all* ascertained by the signature of defendant. Others refuse to do so if there is only a claim for interest, postage, cost of protest, &c.

The decision given last year *(Elliott* v. *Gray)* by the learned Senior Judge of York, under this sub-section (the case is referred to at length in O'Brien's D. C. Manual, page 14,) has been acted on by both judges and clerks in several of the outer counties, whilst there is a conflict of decision in others, so that before a suit is brought in any county involving questions under 11, it seems to be necessary to inquire how the sub-section is there interpreted.

Under the decisions hereinafter referred to we think there is sufficient analogy between previously existing statutes, and the present section to make the line of duty to the taxing officer or to the judge in granting an order for costs, tolerably certain. The words, "a debt or money demand, the amount or balance of which does not exceed $200 and the amount or original claim as ascertained by the signature of the defendant," &c., appear, in the light of decided cases, to be so obvious in their import, that there is room for little doubt on the subject. We are not aware that up to the present time any adverse or authoritative decision by either of the Superior Courts, has been given on the question which was involved in *Elliott* v. *Gray*, or on other points arising under the sub-section named. Claims are frequently forwarded to or placed in the hands of Clerks of Division Courts for suit, which do not seem to come within the extended jurisdiction of those Courts, and on the authority of many decided cases in England and this Province are not subjects for their cognizance. We are aware that claims on open accounts have been put in suit in which for want of the disputing note by the defendant, Division Court Clerks have taken upon themselves to sign judgment although they have been for sums exceeding $100, and $200; although there have been no signatures of the defendants shewing that the amounts were ascertained and sanctioned by them. These are so plainly and obviously illegal that it were idle to speak of them, as they have grown out of the mixed ignorance and rapacity of those (few in number we are happy to think) who would do anything to get fees and make costs for themselves.

There is, however, another class of cases wherein as to part of the plaintiff's claim, the sum has been ascertained by the signature of the defendant to an amount exceeding $100, and not exceeding $200, and charges have been added—for postage, expenses of protest, for noting—and we have even seen in one case a claim for "Attorneys Charges." It is questionable with us under the decision we have read, whether any of these charges can be legally claimed as accretions or as accessary to the principal debt demanded; — it is even doubtful whether interest can be added to the debt "ascertained by the signature of the defendant" where the payment of interest is not part of the contract itself. Of the right to add Attorney's charges we make no doubt whatever; there is no sanction for any such under this head. Some even doubt whether a note for a sum over $100 payable with interest can be recovered in the Division Court if interest is demanded. We propose, therefore, to lay before our readers an epitome of some of the decided cases bearing on the question, which we think may be useful to our readers at the present time.

Postages and expenses of noting and notarial charges form no part of the debt, but

may be recovered as damages on the dishonor of a bill or non-payment of a promissory note. It has been usual to allow these in the Courts of Record, in computing principal and interest on a promissory note or bill of exchange or instrument set forth in the pleadings or special endorsement of the summons. Formerly they were only allowed where they had been specially laid in the form of a claim for damages; but it will be admitted that this stands upon its own peculiar ground, as accretions, or as accessory to the principal cause of action; they are, in fact, no part of the debt, because, if the debt or principal sum were paid after it became due, and the payee of a note or obligee of a bond were to receive the principal debt after it had become payable, he could not maintain an action afterwards *on the instrument* for the interest or charges; for, in such a case, the defendant might plead *solvit post diem*, and the plaintiff would be barred from recovering the interest, he having received the principal; it would not, as we have said, *form part of the debt*, but merely entitle the plaintiff to a special claim for damages (see *Dixon* v. *Parker* 1 Esp. 110, *Kendrick v. Lomax* 2 Cr. & J. 405, and *Rogers* v. *Hunt* 10 Ex. 474). In the case last named the summons was specially endorsed for £31 8s. 9d., claimed as due for balance of principal, interest, expenses of noting and commission due on a bill of exchange for £75 9s. accepted by defendant. Judgment by default was signed as for want of appearance. In an application to set aside the judgment as irregular, because the special endorsement was not such as was contemplated by Imp. Stat. 15 & 16 Vict. c. 76, which authorized the signing of judgment *for a debt* or *liquidated demand in money*, the plaintiff having no right to claim the expenses of noting; it was held by Parke B., that it ought to have appeared on the face of the endorsement itself, that the claim was for a *liquidated demand*, and that the plaintiff had no right to add the claim for the expenses of noting

In our Superior Courts of common law the meaning of the words, "ascertained by the signature of the defendant" has been considered and to a great extent settled. The two leading cases seem to be *Wallbridge* v. *Brown* in the Court of Queen's Bench, and *Cushman* v. *Reid* in the Court of Common Pleas. The first of these seems to have reached the utmost verge of what might be considered as ascertaining an amount by the act of the parties or by signature of the defendant—that is to say, if the defendant's act or signature is to be the attestation of the sum to be paid as a debt due to the plaintiff, for we do not see how a sum can be said to be ascertained which has not been reduced to a fixed certainty between the parties. The case is found reported in 18 U. C. R. 160, and was brought in question on an application for a prohibition as not being within the provision and meaning of 19 Vict. ch. 90., sec. 20, which gave the County Courts jurisdiction in all cases and suits relating to debt, covenant and contract to $400, where the amount was liquidated or ascertained by the act of the parties or by the signature of the defendant. The defendant had by writing bound himself to pay for a lathe, pulleys, etc., the "invoice price and the charges of freight, duties, etc.," and to give his note for the articles as well as others he might purchase from the plaintiff at six months from date, payable at a bank with interest. At the trial it was found necessary for the plaintiff to prove the amount of his claim, and he called a witness to shew the invoice price of the lathe and the amount of charges and duties paid, from which it was contended that if this proof were required the case was beyond the jurisdiction of the court, the amount not having been "ascertained by the act of the parties, or signature of the defendant." The court, however, held otherwise, and discharged the application. Were it not for this decision one would have supposed that what the jury were obliged to ascertain by the evidence of a witness, the statute intended that the parties

themselves should have ascertained by their own act, or should have been settled by the signature of the defendant before the suit was brought, and it must be remarked that in the case cited no sum of money whatever was mentioned in the writing signed by the defendant. The subsequent case of *Cushman* v. *Reid* 5 Prac., R. 121 and 20 C. P. 147, was an action on a promissory note made at Chicago, whereby the defendant twelve months after date promised to pay the plaintiff $900, with interest at ten per cent. It had been mutually admitted between the parties, that (although the sum mentioned in the note *was* ascertained by the signature of the defendant and the note in fact signed by him), the amount was payable in United States Treasury Notes—termed "greenbacks;" and that whatever plaintiff was entitled to recover, (if anything) the amount should be such sum in Canadian or British currency, as would be equivalent to greenbacks, &c. The cause was carried down for trial to the County Court, under the Law Reform Act of 1868, and damages assessed at $743.53. Application was afterwards made in Chambers to stay proceedings because it was contended the Act did not apply, the amount for which the action was brought not being "liquidated or ascertained by the signature of the defendant" within the 17th section of the Law Reform Act, 1868. A rule was subsequently obtained to set aside the verdict for irregularity:—it was held that the case was distinguishable from *Wallbridge* v. *Brown*, inasmuch as it appeared that the sum for which the defendant was bound, was not $900 of Canadian money but such amount in Canadian money as having regard to the value of United States treasury notes and Canadian currency the $900 expressed in the note, with interest, should be worth; which value was so constantly varying, and an element of uncertainty existing about it, that it was rendered impossible to say that the amount sued for was ever "liquidated or ascertained by the signature of the defendant." It is very plainly set forth in the judgment of Gwynne J. (page 152) that if so "ascertained" *it must have been when the defendant affixed his signature to the instrument*; that it was obvious that at the time it was not only not ascertained but it was *unascertainable* what would be the amount payable and due under the instrument twelve months afterwards, because the value of the U. S. Treasury notes fluctuated every day, and some days more than once or twice.

It had been argued for the plaintiff that *Wallbridge* v. *Brown* was decisively in favor of the plaintiff, but the court held not—for in that case the defendant had agreed in writing to pay to the plaintiff the invoice price of the lathe and the charges for freight and duty, and reference could be had to the certain price named in the invoice and to the fixed charges for freight and duty paid by the plaintiff, for the purpose of determining that the amount claimed by the plaintiff was sufficiently liquidated, and ascertained by the act of the parties, within the amount for which an action could be brought in the County Court, so as to give that Court jurisdiction to try the case; but that in the case in question there was nothing certain or ascertained by the signature of the defendant, by which the amount demandable could be determined;—that with the varying quotations of the value of United States funds or greenbacks as compared with Canada currency, the defendant could have nothing to do, and evidence must necessarily be called for the purpose, which might show great variation; and the Court held quite decisively that the Law Reform Act did not contemplate removing from the Superior Court, for trial in an inferior court at the will of the plaintiff alone, a cause of action where the whole principal amount demanded by the plaintiff in the action was not clearly "ascertained by the signature of the defendant."

It would seem hard to reconcile these decisions in what they may seem to conflict in

so far as logic is concerned, but in law we are bound to accept them as we find them, and from the whole of them we deduct the following: 1st. That a suit may be brought under the Division Court Act of 1880, where the instrument plainly sets forth that the sum demanded, which the plaintiff has a right to recover, had been ascertained when the defendant affixed his signature to it, and not otherwise. 2nd. That no other sum can be added by way of damages, or as an accretion, or accessary to the principal. 3rd. That if any such sum is claimed it must be set up in the form used in a Court of Record and can only be used there and not in a Division Court.

The general tenor of the law on the subject is, we think, clear, and there need be no difficulty under the cases to which we have referred. It deserves to be particularly noted that the cases of *Wallbridge* v. *Brown* and *Cushman* v. *Reid* were decisions under two different Provincial statutes—that the one under which the first was decided gave the County Court jurisdiction over sums *liquidated by the act of the parties as well as ascertained by the signature of the defendant*, and that the statute under which the second case was decided was, like the Division Court Act of 1880, more limited in its provisions, and these elements of difference may have guided the learned judges very extensively in the conclusions which they reached in each case which stood on its own peculiar merits. We make no doubt that ere long cases will come up which will settle the law on the subject, if it be not already considered to be settled.

ON MARRIAGE WITH A WIFE'S SISTER.

Marriage with a deceased wife's sister is as unlawful in Canada as it is in England. But the actual state of the law on this question is not generally known. In 1862, the Court of Chancery in Upper Canada decided —in the case of *Hodgins* v. *McNeil*—that Lord Lyndhurst's Act of 5 & 6 Will. IV., c. 54, which declared such marriages to be thenceforth not merely voidable but actually null and void *ab initio*, was not applicable to this country, not having been extended to colonies possessing local legislatures. Accordingly, in Canada, the law previously in force governs; and the combined action of a civil and of an ecclesiastical court is required to be invoked for the purpose of invalidating a marriage of this description.

The ancient law of the realm pronounces marriage with a deceased wife's sister to be unlawful, and voidable upon the issue of a judgment of nullity from an ecclesiastical court, which may be pronounced at any time during the life of both parties. But inasmuch as no ecclesiastical court has been established in Canada, the machinery for dissolving these unlawful connections does not exist. And by the common law, such a marriage, if not previously annulled, may not be impeached after the decease of either of the parties thereto. This is a merciful provision to prevent the bastardizing of the children, who are thenceforth accounted, for all practical purposes, as legitimate. (See 9 Grant 310.) But my object in this article is to direct attention to the Divine law upon this momentous question.

That law is contained in the 18th chapter of Leviticus, which enumerates certain degrees of consanguinity and of affinity within which intermarriage is forbidden. The list therein given includes relationships by blood (or, consanguinity) as well as by marriage (or, affinity). But, before animadverting upon this distinction, it may be well to state that the restrictions laid down in this portion of Holy Scripture were formally incorporated into the law of England by the Statute of 32 Henry VIII., c. 38, which prohibits all marriages between persons within "the Levitical degrees."

In the interpretation of this law the legal tribunals in England have uniformly upheld

and repeatedly affirmed one principle. They have insisted that the express Levitical prohibition of marriage between persons of a specified degree of relationship is to be extended to all marriages which are *in paritate rationis*; *e.g.*, marriage being expressly forbidden between a woman and her husband's brother, it is also forbidden, by necessary implication, between a man and his wife's sister, as being within the same degree of relationship as a marriage between the parties first named.

It was in conformity with this principle, that the table of forbidden degrees of marriage, contained in the Church of England Prayer Book, was framed and promulgated by Archbishop Parker, in 1563. This table includes several prohibitions not expressly mentioned in Leviticus xviii: but which are nevertheless strictly deducible from the Levitical prohibitions by the application of the aforesaid rule of interpretation. That this interpretation is not overstrained, but is in accordance with the declared will of the Supreme Lawgiver, is manifest, on referring to the sixth verse of the chapter, wherein it is said "none of you shall approach to any that is *near of kin* to him [literally, to any flesh of his flesh,] to uncover their nakedness; I am the Lord."

The Scripture then proceeds to enumerate, —as examples of the rule thus declared,— thirteen instances of persons who are forbidden to intermarry, because they are either directly or indirectly, "near of kin." Six of these relations, only, are 'blood relations,' the remaining seven are persons related only by marriage. It has been argued that it is unwarrantable to add, by inference, to the prohibitions set forth in God's Word. This assumption is refuted by the fact, that Scripture does not expressly forbid a man to marry his own daughter, or his own sister. But a man is expressly forbidden to marry his brother's widow, or, in other words, a woman is forbidden to marry her deceased husband's brother. This prohibition, indeed, is twice repeated in Holy Scripture; once, as we shall presently notice, with a special malediction; and the reason given is, that the wife of a brother is *one flesh* with him. Can it be denied that his wife's sister is as near to a man as his brother's wife? God has forbidden the former of these marriages as abominable; how can He be supposed to approve of the latter?

I need scarcely advert—in this connection—to the peculiar circumstances under which, for special tribal reasons, God thought fit to dispense with His own law, and to *command* a Jew, in a certain exceptional case, to marry the widow of his brother, in order "to raise up seed unto his brother." God is the "One Lawgiver," and whatsoever He directs must always be right. He commanded Abraham to slay his son; but that would not justify any man, without similar authority, in taking human life. But this particular command was given only to Jews, and to them only when the brother had died without issue. Moreover, to Jews themselves, under other circumstances, it was forbidden, with an additional penalty, for it is written (see Levit. xx. 21), "If a man shall take his brother's wife, it is an unclean thing: he hath uncovered his brother's nakedness; *they shall be childless.*"

There is another point worthy of mention in this connection, upon which some confusion of ideas prevails. It is in regard to the 18th verse of Leviticus, chap. xviii., which, in the authorized version, reads thus:— "Neither shalt thou take a wife to her sister, to vex her, * * beside the other, in her lifetime." Some have supposed that this verse justifies marriage with a deceased wife's sister, by forbidding, merely, marriage with two sisters during the life of the one first espoused; and thus, by inference, permitting such an alliance to the widower. This is quite a mistake. The best Hebrew scholars are agreed that the verse in question has nothing whatever to do with the matter we are now considering. The true rendering of this verse assigns a very different meaning to

it, similar, in fact, to that which is indicated in the marginal note in our English Bibles. This note suggests, as an alternative translation, "one wife to another," instead of, "a wife to her sister"; reference being subjoined to the passage in 1 Samuel i. 2-6, concerning Elkanah's two wives, Hannah and Peninnah, of whom we read that the one provoked the other, and caused her to fret. Thus, by the revised translation—which is amply warranted, not only in itself, but by its agreement with Hebrew idioms in corresponding passages—this verse is found to embody a declaration of the mind and purpose of God against polygamy. It is true that Jewish practice did not conform to this rule: it is also true that, during the Mosaic, as also under the Patriarchal dispensation, God permitted a departure from it; but "from the beginning it was not so."

When Christ came, He lifted up a higher moral standard. This He did, not by introducing a new law, but by leading His disciples back to the old. He showed that because of the hardness of men's hearts, Moses had been allowed to sanction certain deviations from God's holy and perfect law; but this was only by sufferance, and for a time. Christ, as the Revealer of the Father's mind and will, then proceeded to point out the true law of marriage, at its original institution, in these words:—"At the beginning," God created man "male and female;" and "for this cause shall a man . . cleave to his wife: and they twain shall be one flesh. Wherefore they are no more twain but one flesh." (Matt. xix. 4–6.)

Since this reiteration by our Lord of the primary law of marriage, polygamy has been prohibited in all Christian nations, and may no longer be practised, either by Jew or Gentile, wherever Christian law prevails. In this very passage of St. Matthew's Gospel we have the clue whereby we may determine upon the propriety, or otherwise, of marriage with a deceased wife's sister.

Christ asserts a man and his wife to be "*one flesh.*" This is obviously a spiritual and not a physical truth, for in respect to their material substance their duality remains. But their union in marriage is effected by a spiritual action of the personal will, ratified by the law of God, which is so real and permanent that they are declared to have been "joined together" by God Himself, and may not, therefore, be "put asunder" by man's authority.*

The words in Genesis, as explained and enforced by Christ, are obviously the basis—not only of the injunctions against marriages within the prohibited degrees in the book of Leviticus—but likewise of all Christian legislation on the subject. Such alliances are expressly forbidden because it is "wickedness" for a man "to approach to any that is *near of flesh* to him to uncover their nakedness." We are, therefore, bound to believe that within whatever degree it is unlawful for a man to marry his blood relations, within the same degree he is forbidden to marry the relations of his deceased wife: and that within the same limits, a woman, by parity of reason, is forbidden to marry the relations of her husband. This, indeed, is the well understood conclusion of Christian antiquity; and the law as interpreted by Christian courts of justice, in various able judgments within the present century.

One further objection, however, must be noticed. It has been contended that the moral code, set forth in Leviticus, was designed merely for Jews, and is not binding

* We remember seeing in the lay press, the answer to a question propounded to Professor Owen, the well known physiologist, which has seemed to some to show that the expression "one flesh" has a physical as well as a spiritual meaning. The question asked him was whether a woman is so indelibly imbued with the characteristics of her husband that her offspring by a second husband are influenced thereby. The answer of Mr. Owen is said to have been as follows:—

"The interchange between the maternal and fœtal circulations in placental mammals impresses so much of the male's nature upon the female as the mixed product, the fœtus, can impart. The evidence of this is shown by the reappearance of more or less of the father's character in subsequent offspring of other male parentage. Observations of this fact may have suggested the high value set on the virginity of a wife by various ancient races of mankind. After a woman has conceived she and her husband literally become one flesh (as the Bible asserts they do), and in the course of years they resemble each other in some slight degree." We are not prepared to say that the prohibitions in Leviticus warrant the assertion that this view explains all the difficulties of the subject, but it is at least an interesting addition to the learning on this much vexed question.—EDS. C. L. J.

upon Christians. The 18th chapter of Leviticus plainly refutes this objection, for it declares that the heathen nations, in breaking the law embodied therein, had become guilty of heinous sin, for which their very land was defiled, and they themselves were subjected to God's judgments.

This leads to the unavoidable inference that at some earlier period, God had unmistakably revealed His will to the heathen nations concerning this matter, and that the law given by Moses was but a reiteration and reinforcement of the substance of an earlier code, in relation to marriage, which was binding upon all nations. For Scripture teaches that "sin is the transgression of the law," (1 John iii. 4); that "sin is not imputed where there is no law," (Rom. v. 13); and that "where no law is there is no transgression," (Rom. iv. 15). It is evident, then, that the heathens of old fell into their abominable ways in respect to marriages by departing from a law once given by God for their guidance.

The precise circumstances of this Divine communication to the heathen are not known to us. But it is worthy of remark that the decree issued by the first Council at Jerusalem, as to the obligations incurred by Gentile converts to Christianity, throws light upon this question. While absolving such converts from the need of obeying the ceremonial law of Moses, the apostles and elders, speaking by the Holy Ghost, agreed that it was sufficient that they should refrain from certain objectionable practices, of which one was "fornication." This sin consists in "going after forbidden flesh." And the apostolic injunction obviously points to those "seven precepts given to the sons of Noah," to which Selden, Hooker, and others learned writers refer, as embodying the primitive patriarchal religion. Of these precepts, one was specially directed "against certain incestuous marriages:" (see Bp. Wordsworth, on Gen. ix.4: McClintock and Strong, Biblical Cyclop. verbo "Noachian Precepts.") This command, it is reasonable to suppose, contains the substance of the primitive law concerning marriage: and for their turpitude in breaking this law, in the several details enumerated in the 18th chapter of Leviticus, Moses declared that the land of the heathen was defiled. He also warned God's people that "whosoever shall commit any of these abominations, shall be cut off."

I venture to hope that these brief suggestions on the Divine law of marriage, may be useful in removing the vague ideas which too commonly prevail, on this vital question. Marriage affects the welfare of human society, because it concerns man as a moral and accountable being. If we believe that God is the source of all law, we must look to His precepts to guide us, both in regard to the things we may lawfully practise, and those from which we must refrain.

Alpheus Todd.

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT.

Quebec Cases—February, 1881.

Gingras v. Desilets et al.*

Damages—Judgment of the Court of first instance.

This was an action brought by appellant against the late P. O. Desilets, the original defendant in the cause, claiming a sum of $4,000 damages: 1st, by injurious words, threats and false arrest; 2nd, by violence and wounds causing the appellant to have one of his fingers amputated, as well as a long and excessively painful disease, to wit: the lock-jaw, which put him for a long time in imminent danger of death, and left him crippled and with his general health gravely affected for the future.

The defendant appeared by his attorney, but did not file any plea. After taking the evidence, the Superior Court at Three Rivers

*In all cases the appellants' names appear first.

condemned the respondents, (the present cause having been continued against them by *reprise d'instance*, as heirs and testamentary executors of the said P. O. Desilets), to pay to the appellant the sum of $3,000 damages.

On appeal to the Court of Queen's Bench, the judgment of the Superior Court was reduced to $600, the amount allowed to the appellant, and he was condemned to pay all the costs of appeal.

Held, that inasmuch as the damages awarded were not of such an excessive character as to show that the judge who tried the case had been either influenced by improper motives or led into error, the amount so awarded by him ought not to have been reduced. [TASCHEREAU J., dissenting.]

O'Gara, Q. C., and *Hould*, for appellant.

Angers, Q. C., for respondents.

Appeal allowed with costs.

MARCH, 1881.

LEVI v. REED.

Jurisdiction—Right of appeal by plaintiff, respondent in Court of Queen's Bench—Slander

The present appellant had sued the respondent before the Superior Court at Arthabaska, in an action of $10,000 damages for verbal slander. The judgment of the Superior Court awarded to the appellant a sum of $1,000 for special and vindictive damages.

By the judgment of the Court of Queen's Bench, the amount awarded was reduced to $500, and costs of appeal were against the present appellant.

Held, on appeal, 1. That the plaintiff, although respondent in the Court of Queen's Bench, was entitled to appeal, as in determining *the amount of the matter in controversy* between the parties, the proper course was to look at the amount for which the declaration concludes, and not at the amount of the judgment. *Joyce* v. *Hart*, 1 Can. S. C. R. 321, reviewed. [TASCHEREAU, J., dissenting.]

2. That, as in the case of *Gingras* v. *Desilets*, the amount of damages fixed by the judge who tried the case ought not to have been reduced.

Irvine, Q. C., and *Gibson*, for plaintiff.

W. Laurier, Q. C., for respondent.

Appeal allowed with costs.

ABRAHAMS v. THE QUEEN.

Indictment—Delegation of authority by Attorney General—32 & 33 Vict. cap. 29, sec. 28—Obtaining money by false pretences.

Appeal from the Court of Queen's Bench, Montreal.

The indictment contained four counts for obtaining money by false pretences.

On this indictment was endorsed: "I direct "that this indictment be laid before the Grand "Jury.

Montreal, 6th October, 1880.

L. O. LORANGER,
Atty. General.

"By J. A. Mousseau, Q. C.
"C. P. Davidson Q. C.

Defendant moved to quash the indictment. The motion was supported by affidavit, and the learned Chief Justice rejected it, intimating at the time that as he had some doubts, he would reserve the case, should the defendant be convicted. The defendant was found guilty, and the following questions *inter alia* were submitted for the consideration of the Court of Queen's Bench:

1. Whether the Attorney General could delegate his authority, to direct that the indictment in this case be laid before the Grand Jury, and whether the direction as given on the indictment, was sufficient to authorize the Grand Jury to enquire into the charges and report a true Bill.

2. Whether if the indictment was improperly laid before the Grand Jury it should have been quashed on the motion made by the defendant.

It was admitted that the Attorney General gave no direction with reference to this indictment, and that the gentlemen who put the endorsement on the indictment, did so merely because they were representing the Crown at the current term of the Queen's Bench under a general authority to conduct the Crown business at such term, but without any special authority over, or any directions from the Attorney General in reference to this particular indictment.

Held, on appeal, that under 32, 33 Vict., c. 29, sec. 28, the Attorney General has no authority to delegate to the judgment and discretion of another the power which the Legislature has

authorized him personally to exercise; that no power of substitution had been conferred, and therefore the indictment was improperly laid before the Grand Jury.

Appeal allowed.

J. Doutre, Q. C., for appellant.

C. P. Davidson, Q. C., for respondent.

SHAW v. MACKENZIE ET AL.

Capias—Damages—Want of probable and reasonable cause.

This was an appeal from a judgment of the Court of Queen's Bench for the Province of Quebec, affirming the judgment of the Superior Court by which the plaintiff's action was dismissed.

The plaintiff (present appellant) claimed damages from the respondent for the malicious issue and execution of a capias against him, the plaintiff, at Montreal, in July, 1878.

The defendants, on appeal, relied on a plea of justification, alleging that when they arrested the appellant, they acted with reasonable and probable cause. In his affidavit, the reasons given by the deponent Kenneth Mackenzie, one of the defendants, for his belief that the appellant was about to leave the Province of Canada were as follows:—"That Mr. Powis, the deponent's partner, was informed last night in Toronto by one Howard, a broker, that the said W. J. Shaw was leaving immediately the Dominion of Canada, to cross over the sea for Europe or parts unknown, and deponent was himself informed, this day, by James Reid, broker, of the said W. J. Shaw's departure for Europe and other places." The appellant Shaw was carrying on business as wholesale grocer at Toronto, and was leaving with his son for the Paris Exhibition, and there was evidence that he was in the habit of crossing almost every year, and that his banker and all his business friends knew he was only leaving for a trip; and there was no evidence that the deponent had been informed that appellant was leaving with *intent to defraud*. There was also evidence given by Mackenzie, that after the issue of the capias, but before its execution, the deponent asked plaintiff for the payment of what was due to him, and that plaintiff answered him "that (Shaw) would not pay him, that he might get his money the best way he could."

Held, on appeal, that the affidavit was defective; the fact of a debtor, about to depart for England, refusing to make a settlement of an overdue debt, is not sufficient reasonable and probable cause for believing that the debtor is leaving *with intent to defraud his creditors*. Judgment reversed; $500 damages awarded.

Maclaren, and *Rose*, for appellant.

Doutre, Q.C., for respondents.

Appeal allowed.

NEW BRUNSWICK CASES.

SNOWBALL v. STEWART.

Evidence—Misdirection.

This was an action brought by Mr. Stewart against Mr. Snowball, to recover a quantity of logs alleged to have been cut by parties named Sutherland and Kirwan, on lands held by plaintiff under license from the Government. On the trial, the admissions of these parties were admitted on the plaintiff's counsel undertaking to connect the defendant with these parties This he failed to do, but called an agent of the plaintiff, to depose as to certain statements of Mr. Snowball. The Chief Justice withdrew the evidence of these admissions from the jury, and directed them that if they thought Snowball admitted he had the logs, the plaintiff was entitled to a verdict. The jury found a verdict for the plaintiff. A new trial was moved for on the grounds: 1. That the Chief Justice had no right to withdraw the objectionable evidence admitted by him from the jury. 2. That outside of these statements there was no evidence, and the learned Judge misdirected the jury on that point.

The Supreme Court of New Brunswick discharged the rule.

Held on appeal, that there was no evidence that the logs sought to be recovered had been cut on plaintiff's premises, and that while the Chief Justice had the right to withdraw the objectionable evidence from the jury, he had misdirected the jury as to the effect of the statements made by Snowball to plaintiff's agent.

Weldon, Q. C., for appellant.

Wetmore, Q. C., for respondent.

Appeal allowed.

TEMPLE v. NICHOLSON, ET AL.

Bill of sale—License to grantee to take possession—Progeny—Trover.

Trover. The declaration charged the appellant with the wrongful conversion of a horse and colt, the property of the respondents. The defendant pleaded, *inter alia*, that the colt was the property of one Thomas Hackett, and the defendant, as Sheriff of York, took the same under an execution against Hackett. The plaintiffs claimed the property was vested in them by a mortgage bill of sale, and given to them by Hackett as collateral security with other mortgages which they had on his real estate. The colt was the progeny of a mare which was mentioned in the bill of sale, and which always remained in the possession of Hackett. In the mortgage there was a proviso that until default the said Thomas Hackett might remain in possession of all the property mortgaged or intended so to be; but with ful power to the plaintiffs, in default of payment, to take possession and dispose of the property as they would seem fit. At the time this colt was foaled it was proved that there had been default in payment of both principal and interest money secured by the chattel mortgage.

Held, that the plaintiffs, being under the bill of sale the absolute owners of the mare, and after default entitled to take possession of her, and the foal having been dropped while plaintiffs were such owners and entitled to the possession of the mare, the colt was their property,—"*Partus sequitur ventrem.*"

Gregory, for appellant.

Wetmore, Q. C., for respondents.

ALMON v. LEWIS.

Will—Annuities—Sale of corpus to pay.

Bill by the executors and trustees under the will of John Robertson, deceased, to obtain the direction of the Court as to the rights of the several persons interested under the will.

John Robertson died on the 5th August, 1876, leaving a will dated 6th August, 1875, and a codicil dated 21 July, 1876. By the will he devised to his widow an annuity of $10,000 for her life, which he declared to be in lieu of her dower. This annuity the testator directed should be chargeable on his general estate. The testator then devised and bequeathed to the executors and trustees of his will certain real and personal property particularly described in five schedules, marked respectively, A. B. C. D. E., annexed to his will upon the trust, viz.: "Upon trust during the life of his wife to collect and receive the rents, issues, and profits thereof which should be and be taken to form a portion of his 'general estate;' and then from out of the general estate during the life of the testator's wife the executors are to pay to each of his five daughters the clear yearly sum of $1,600, by equal quarterly payments, free from the debts, control, and engagement of their respective husbands." Next reserving the statement of of the trusts of the scheduled property specifically given, the testator provides that from and after the death of his wife the trustees are to collect and receive the rents, issues, dividends, and profits of the lands, etc., mentioned in the said schedules, and to pay to his daughter Mary Allen Almon the rents, etc., appointed to her in schedule "A;" to his daughter Eliza, of those mentioned in schedule "B;" to his daughter Margaret, of those mentioned in schedule "C;" to his daughter Agnes, of those mentioned in schedule "D;" and to his daughter Laura, of those mentioned in schedule "E;" each of (his) said daughters being charged with insurance, ground rents, rates and taxes, repairs and other expenses with or incidental to the management and upholding of the property apportioned to her, and the same being from time to time deducted from such quarterly payments." The will then directed the executors to keep the properties insured against loss by fire, and in case of total loss it should be optional with the parties to whom the property was apportioned by the schedules, either to direct the insurance money to be applied in rebuilding, or to lease the property. It then declared what was to be done with the share of each of his daughters in case of her death. In the residuary clause of the will there were the following words:—"The rest, residence and remainder of my said estate both real and personal and whatsoever and wheresoever situated," I give, devise and bequeath the same to my said executors and trustees upon the trusts and for the interests and purposes following: He then gives out of

the residue a legacy of $4,000 to his brother Duncan Robertson, and the ultimate he directs to be equally divided among his children upon the same trusts with regard to his daughters as are hereinbefore declared with respect to the said estate in the said schedules mentioned.

The rents and profits of the whole estate left by the testator proved insufficient after paying the annuity of $10,000 to the widow, and the rent and taxes upon his house in London, to pay in full the several sums of $1,600 a year to each of the daughters during the life of their mother, and the question raised on this appeal was whether their executors and trustees had power to sell or mortgage any part of the corpus or apply the funds of the corpus of the property to make up the deficiency.

Held, on appeal, that the annuities given to the appellants and the arrears of their annuties are chargeable on the *corpus* of the real and personal estate subject to the right of the widow to have a sufficient sum set apart to provide for her annuity.

Weldon Q.C., for the Misses Robertson.

Gilbert, for Mrs. Almon.

Kaye, Q.C., for respondents.

TEMPLE v. CLOSE.

Trover—Vendor and purchaser—Property in goods.

This was an action of trover for bricks. The plaintiff agreed with one Thomas, a brick-maker, who had a kiln of bricks burnt, ready for use, containing somewhere in the vicinity of 100,000 bricks, to purchase, and paid for a portion of them, 50,000 according to sample. Thomas delivered to plaintiff 16,000, and the balance of the bricks was taken by the defendant as Sheriff of York, under an execution against Thomas. The question to be decided on this appeal was, whether the bricks were the plaintiff's property, under what had taken place between Thomas and him, so as to exempt them from seizure under the execution.

Held, that there was no sale of a specific property under the contract, and that the property in the bricks did not pass to the purchaser until the bricks had been selected.

G. F. Gregory, for appellant.

Wetmore, Q.C., for respondent.

Appeal allowed with costs.

DOMINION TELEGRAPH COMPANY v. GILCHRIST.

Trespass—Right of Company to cut ornamental trees.

The servants of the Company, in erecting their line through Norton, King's County, cut down ornamental trees on Dr. Gilchrist's property, claiming the right to do so under their act of incorporation. In an action of trespass, tried at King's County, Dr. Gilchrist obtained a verdict for $235 damages, which was sustained by the Supreme Court of New Brunswick. The Company appealed on the following grounds: 1. That the practice of the Court not to allow the defendant to cross-examine a witness to prove his plea, as decided in *Atkinson* v. *Smith*, 4 Allen, 309, was erroneous; 2. That as the Company had the right to cut down ornamental or shade trees where necessary for the erection, use or safety of their line, they were the judges of that necessity; and 3. That the plaintiff's remedy was under the clause in the Company's Act referring to arbitration, and ousted the jurisdiction of the courts.

Held, overruling these objections, that the Company should be held to a strict construction of their act of incorporation, and were bound to prove that it was necessary for the erection, use or safety of their line to cut these trees, and that having failed to do so, they were liable.

Hector Cameron, Q. C. for appellant.

C. W. Weldon, Q. C., and *Burbridge*, for respondent.

Appeal dismissed with costs.

POWER v. ELLIS.

Witness—Refusal to answer questions on cross-examination—Privileged communications—Misdirection.

Plaintiff, (respondent on appeal), a teller in a bank in New York, absconded with the funds of the bank, and came to St. John, N. B., where he was arrested by the defendant, (appellant on appeal), a detective residing in Halifax, N. S. and imprisoned in the police station for several hours; no charge having been made agains him, he was released. While plaintiff was a prisoner at the police station, the defendant went to plaintiff's boarding house and saw his

wife and read to her a telegram, and demanded and obtained from her the money she had in her possession, telling her it belonged to the National Bank and that her husband was in custody.

In an action for assault and false imprisonment, and for money had and received, the defendant pleaded *inter alia*, that the money had been fradulently stolen by the plaintiff, at the City of New York, from the National Park Bank, and was not the money of the plaintiff, that defendant, as agent of the Bank, and acting for the Bank, received the money to and for the use of the Bank, and paid it over to them. Several witnesses were examined, and the plaintiff, having been called as a witness on his behalf, did not, on cross-examination, answer certain questions, relying, as he said, upon his counsel to advise him, and on being interrogated as to his belief that his doing so would tend to criminate him, he remained silent, and on being pressed he refused to answer whether he apprehended serious consequences if he answered the questions. The learned judge then told the jury that there was no identification of the money, and directed them that if they should be of opinion that the money was obtained by force or duress from plaintiff's wife they should find for the plaintiff.

Held, (HENRY, J. dissenting), that the defendant was entitled to the oath of the party that he objected to answer because he believed his answering would tend to criminate him.

2, Per GWYNNE, J., that there was misdirection in this case.

Barker, Q. C., for appellant.

Weldon, Q. C., for respondent.

QUEEN'S BENCH.

IN BANCO—MARCH 11.

MONDS v. MARTIN

Replevin—Illegal distress—Evidence of lease—New trial.

In an action of replevin the jury found for the defendant, who disagreed with the plaintiff as to the terms of the alleged lease. The defendant was supported by one W., who took down the instructions for a lease which he produced. The lease was not drawn, because the defendant, the landlord, being defendant in ejectment upon a mortgage in default was arranging through W. for a loan to pay off the mortgage. After the trial a letter of W.'s was discovered, which had been written to a Loaning Company, and referred to the plaintiff's being tenant, and supported to a certain extent the plaintiff's story. A new trial was granted, as it was uncertain whether there was a lease or an agreement for one only.

McCarthy, Q. C., for plaintiff.

Mulock, for defendant.

PECK v. PHŒNIX INSURANCE COMPANY.

Fire insurance—Material alteration in premises—Notice of.

The plaintiff's premises being insured as "occupied by a tenant as a grocery store and dwelling," were re-let to his son-in-law, who used them for dealing in furniture, and had a small room behind the shop in which he had a carpenter's bench and tools, and did repairing and rough work. D., the defendants' local agent, was notified of this change, and went on to the premises and saw the tenant at work making a secretary. He wrote to the Head Office at plaintiff's request, notifying them of this, and they answered that if the policy were sent they would consent in writing to it. The policy contained a condition that "any change material to the risk and within the control or knowledge of the assured shall void the policy as regards the part affected thereby, unless the change be promptly notified in writing to the company or its local agent, and the company so notified may * * cancel the policy. * * *

The jury found for the plaintiff.

Held, that the verdict should not be disturbed, as the jury had fairly found the notification of the change sufficient.

Semble, that the transmission of the policy for endorsement was not essential if the communications were reasonably sufficient.

Meredith, Q. C., for plaintiff.

Bethune, Q. C., for defendant.

ST. JOHN v. BULLIVANT.

Trover

The plaintiff was mortgagee of sixty-four shares in defendant's propeller, and on defendant's insolvency was allowed by the creditors and assignee to take the vessel as she stood at a valuation. Before this time the defendant had removed from the vessel a piano and several other articles, and had substitured stoves for steam heaters.

Held, that the plaintiff was concluded by the settlement with the assignee, by which he took the vessel as she then stood, in the absence of fraud, and could not recover these articles. The mortgagor being in possession had a right to manage the vessel according to his good discretion by removing articles on board or substituting others for them.

Semble, that a piano on board a vessel would not pass to the mortgagee under such general words as "with her boat, guns, ammunition, small arms and appointments."

McClive, for plaintiff.

Bethune, Q. C., for defendant.

LUMSDEN v. DAVIES.

Sale of goods upon conditions as to re-purchase—Statute of Frauds.

The defendant sold to the plaintiffs a quantity of tea, and agreed that if the plaintiffs, after trying to dispose of the same, had any left upon their hands at a certain date that he, the defendant, would re-purchase it at an advance of ten cents per pound. The tea was delivered, and upon the defendant's refusal to buy back what was left on the plaintiff's hands at the date named, this action was brought for the breach.

Held, that the whole agreement consisted of one conditional contract of sale and not of two contracts; and that the delivery of the tea by the defendant therefore satisfied the Statute of Frauds.

Osler, Q. C., for plaintiffs.

Ferguson, Q. C., for defendant.

LAPOINTE v. LAFLEUR.

Ejectment—Reservation of certain quantity of land from conveyance—Time of selection.

Defendant conveyed to his son, J. L., jun., the E. ½ of a lot, "reserving from the operation of these presents unto the said parties of the first and second parts (the latter being defendant's wife), during their joint lives, and during the life of the survivor, one acre of the said lot hereby conveyed, the same acre to be taken in any part of the said hereby conveyed, land when the parties of the first and second parts see fit." Defendant continued to live on the lands with his son till the latter's death, in 1876. Several years before his death J. L., jun., built a small house on the land, which was occupied by his men till his death. After his son's death, the defendant went off the land, but returned in about a year, and lived in the small house built by his son, and improved the same. The mortgagees of the son sold to the plaintiff under the power in their mortgage, and the defendant, at the sale to the plaintiff, on being asked, said he had not selected his acre, was then asked to do so, and then selected the part where he was living. The plaintiff was present and heard this, and his conveyance was "subject to the reservations contained in tbe deed from J. L. sen., to J. L. jun."

Held, that the reservation in the deed from defendant to his son was more properly an exception than a reservation, and that an estate for the joint lives of defendant and his wife and for the life of the survivor, remained in the defendant, and he therefore was entitled to select the acre at any time, and was not bound to do so in the life-time of his son.

Burnham v. *Ramsay*, 32 U. C. R. 491, distinguished.

Bethune, Q. C., for plaintiff.

A. Cassels and *W. N. Ponton* for defendant.

PATTERSON v. THOMPSON.

Illegal distress—Replevin—Exemption from distress of goods brought to be manufactured.

The exemption from distress of goods entrusted to persons carrying on certain public trades to exercise their trades upon them is a privilege founded on public policy for the benefit of trade.

In this case saw-logs were taken to a saw-mill by the plaintiff, to be converted into lumber in the due course of business of the mill.

Held, that the business of sawing lumber for

hire is a trade in which is exempted from distress from rent, the property of a stranger brought in to be converted into lumber, and that the plaintiff was entitled to recover; and this, notwithstanding that one of the tenants of the saw-mill appeared to have an interest in the saw-logs, jointly with the plaintiff.

Lount, Q. C., for plaintiff,

McCarthy, Q. C., for defendant.

INGRAM v. TAYLOR.

Interpleader—Liability to seizure of crops in hands of guardian.

A testator in 1873 devised the west half of his farm to the plaintiff in interpleader, his son's wife, and the heirs of her body during the life of her husband, and the east half to the son of the plaintiff; it appearing on the evidence that the object of the testator in so disposing of his property was to prevent it from becoming liable under a judgment previously obtained against his son, the husband of the plaintiff. The plaintiff attended to the management of both her own portion and that of her son, her husband working under her directions. The defendants seized the crops in execution under the judgment against the husband of the plaintiff above referred to, part of which said crops had been grown on the plaintiff's portion, and part on that of her son.

Held, on the evidence, with regard to that portion which had been raised on the plaintiff's land, that a verdict was properly entered for the plaintiff in interpleader.

Lett v. *Commercial Bank* distinguished; and law as to married women commented on.

Held also, with regard to the portion grown on the land of the plaintiff's son, that although, had the husband of the plaintiff worked and used the land himself, the property in the crop would, at common law, have been in him, as guardian of his son, subject to the right of his son to an account; yet, inasmuch as the plaintiff had worked the whole farm, supplied the necessary seed, and expended all that had been spent in raising the crops seized, the facts did not warrant the application of the common law rule, and a rule to set aside the verdict for the plaintiff on that point was consequently discharged.

Bethune, Q. C., and *J. W. Kerr*, for plaintiff.

McCarthy, Q. C., for defendants.

FLEURY v. COPELAND.

Sale of goods "to arrive"—Construction of.

A contract for the sale of goods "to arrive" does not constitute a conditional contract rendering the vendor liable only on the condition of the arrival of the goods. The term is properly applied where goods are either in transit in a named vessel or about to be shipped at a named port in some particular manner.

G. H. Watson, for plaintiff.

J. E. Rose, for defendant.

COMMON PLEAS.

IN BANCO—MARCH 11.

GREENE v. HAMILTON PROVIDENT SOCIETY.

Mortgage—Building Societies—Non-members subject to rules—Default in mortgage—Amount recoverable—Purely money demand—Release—C. S.U.C. ch. 53, 37 Vict. ch. 50, sec. 3 D.

By sec. 3, of 37 Vict. ch. 50 D., borrowers from Building Societies incorporated under C. S. U. C., ch. 53, though not members of the societies, or signing the rules, are made subject to all such rules in force at the time of becoming borrowers.

In an action against defendants, such a Building Society by the plaintiff, a second mortgagee, on the common counts to recover certain moneys, claimed to be due after the payment of the defendant's claim—

Held, under such rules, that the society, on a sale of the land, under a mortgage given by such borrower to the society, on default before the expiration of the time fixed by the mortgage, were not restricted to the amount originally advanced, with the then accrued interest, but were entitled, in addition to the original principal, to discount the future repayments at such rate of interest and on such terms as the directors might determine; and that only the surplus after the deduction of this sum, together with all payments, moneys, and expenses due

[illegible]

[illegible] money was to be paid to the trustees.

The rents of said premises were stated to be greatly reduced, but not a charge for insurance and taxes, or the cost of repairs or the expenses of managing the estate.

It was objected on the argument that the plaintiff could not maintain the action as a [illegible] on a policy issued [illegible] 42 Vict. ch. 9, and that it was [illegible] that the [illegible] mortgagees, should be a party to the suit, and the plaintiff had agreed in a release from the mortgagee, which it was said was void as to the trustees, and free of all moneys which he was to be entitled to receive from the Company as proceeds of the sale or otherwise, the objection was not entertained.

Creelman, for the plaintiff.

Bethune, Q. C., and *Crerar*, for defendants.

PROVINCIAL INS. CO. v. CAMERON, *Executrix*.

Insurance company—Stock—Power of attorney—Calls—Advertisement.

There was also an action against the defendant Cameron in her own right, and actions against five other defendants.

The actions were for unpaid calls on stock.

The stock held by the defendant Cameron in both above capacities was transferred under power of attorney.

Held, that there was sufficient evidence given of the existence of such powers of attorney, and excusing their non production, to let in secondary evidence thereof; and also that the evidence showed that such shares had not been forfeited.

Under the statutes relating to the Company, it appeared that the name of the Company had been changed; but *held* under the circumstances that it did not affect the plaintiff's rights.

It was objected that the shares of certain of the shareholders had been illegally forfeited, but *held* that even if illegally forfeited, no harm was done as they were still liable thereon; but that under the said Acts the directors had power to forfeit.

Held, that under the said Acts the directors could make more than one call at the same time, so long as they allowed thirty days after the publication of the notice for the payment of such calls.

Held also that under the said Acts it was not necessary in the Company to give notice of such calls made in one or more of the several newspapers published in every district where stock was held before suing any of the shareholders who had received such public notice of the calls in a newspaper published in his or their district or districts.

Held also that a variation in the days of payment in the resolutions making the call and its public notice in the newspaper would render such calls invalid.

Objections were also taken to certain resolutions passed subsequently to the resolutions making the call which, it was contended, had the effect of severally extinguishing the calls and giving preference to certain shareholders, but such objections were held untenable.

Robinson, Q.C., and *Huson Murray* for the plaintiffs.

Bethune, Q.C., *Snelling*, *Tilt*, *Biggar*, and *Worrell*, for the defendants, except *Jones*, who appeared in person.

REGINA v. BROWN.

Extradition—Foreign indictment—Sufficiency—Statutes in force.

Held, that the 40 Vict. ch. 25 D., relative to extradition of fugitive criminals, is not in force, but that the law and practice relating thereto is to be found in the Ashburton Treaty, Art. X. and the Statutes 31 Vict. ch. 94 D.; 33 Vict. ch. 25 D.; and the Imp. Act 33 & 34 Vict. ch. 52.

On an application for the extradition to the United States of a person charged with murder therein:

Held, *per* WILSON C. J., that under the above Acts a certified copy of an indictment for murder found by the grand jury of the said foreign country, to wit, Erie County, New York State, was sufficient evidence by itself of such charge to warrant the extradition, but that the other evidence set out in the case, documentary and *viva voce*, was insufficient.

Per OSLER J., that neither the indictment nor the other evidence was sufficient.

Per GALT J., that such other evidence was sufficient, and without it he would hesitate as to accepting the indictment as sufficient by itself.

The order for extradition was therefore allowed.

J. K. Kerr, Q. C., for the Crown.

McMichael, Q. C., for the prisoner.

ROBBINS v. VICTORIA MUTUAL INS. CO.

Mutual Ins. Co.—Failure to deliver proof within thirty days.—Mistake—Recovery.

Upon a policy issued by a Mutual Company, the statutory conditions were endorsed with variations, one of which was, (being the same as sec. 56 of the Mutual Act, R. S. O., ch. 161,) that the proofs, declarations, &c., called for by the statutory conditions should be furnished to the company within thirty days after loss, &c. The loss occurred on the 2nd October, 1878, and on the 5th the plaintiff notified defendants by letter. A few days after, the plaintiff saw one S., an agent of the defendants for obtaining applications, but not for settling claims, but who had acted for plaintiff in settling a previous loss with defendants, and asked him to act for him on this occasion, and do whatever was proper, which S. promised to do. On 17th October the defendant's president came up and saw plaintiff, who informed him of the loss, and all the circumstances relating thereto, and plaintiff was told by him, in answer to his enquiry thereto, that nothing further need be done. The plaintiff, in consequence, did nothing; but subsequently, on hearing that the defendants disputed the claim, some correspondence took place, which resulted in plaintiff employing a solicitor, and proofs were thereupon put in, but after the lapse of the thirty days.

Held, that sec. 2 of the R. S. O., ch. 162, applies to Mutual Companies, and that as the evidence shewed that the non-compliance with the condition as to putting in proof within thirty days was by mistake, &c., the plaintiff was protected, and was therefore entitled to recover.

Lennox (of Barrie), for the plaintiff.

McCarthy, Q. C., for the defendants.

QUINLAN v. THE UNION FIRE INSURANCE COMPANY.

Insurance — Statutory conditions — Buildings within 100 feet—Failure to give notice of—Diagram by agent after personal inspection—Evidence.

The first statutory condition endorsed on a policy of insurance, provided that if any person insures his building or goods and causes them to be described otherwise than as they really are, to the prejudice of the company, or misrepresents, or omits to communicate any circumstance which is material to be made known to the company, in order to enable them to judge of the risk undertaken, such insurance shall be of of no force in respect to the property regarding which the misrepresentation or omission is made. The second statutory condition so endorsed, provided that after application for insurance, it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the company point out the difference relied on; with a variation added, that such application, or any survey, plan, or description of the property to be insured, shall be considered a part of the policy, and every part of it, a warranty by the assured, but the company will not dispute the correctness of any diagram or plan prepared by its agent from a personal inspection. The 20th condition as varied, provided that in case any agent takes any part in the preparation of the application for the insurance, he shall, with the exception above provided in case of a diagram or plan, be regarded in that work as the agent of the applicant. By the application, which was signed, not by the applicant, but by the agent, the applicant was required to make known the existence of all buildings within 100 feet of the insured premises, and it appeared that the applicant had omitted to make known the existence of a small building used for storing coal oil within such distance. A diagram was made and filled in by the agent, and signed by him in his own name as well as the insured, which contained no reference to this building. The diagram was not made from a personal inspection at the time, but from a previous inspection, and the knowledge thereby acquired.

Held, that even if by the above conditions the plaintiff would be relieved from the effect of the

omission to make known the existence of such building where the diagram was made by the agent from a personal inspection, there was no such personal inspection here.

Bethune, Q.C., and *Dixon*, for the plaintiff.
McCarthy, Q.C., and *A. C. Galt*, for the defendants.

IN RE NORTH OF SCOTLAND MORTGAGE CO., AND THE CITY OF TORONTO.

Assessment and taxes—British Co.—Personal property—Liability to assessment—43 Vict., ch. 27, sec. 3 (O.)—*Ultra vires.*

The plaintiffs were a company incorporated under the Imperial Company's Acts of 1862 and 1867, for the purpose of lending money on real estate or on public securities, &c., the registered office of which was in the city of Aberdeen, Scotland, but having an agency in the city of Toronto, the only agency in Canada. All the income or profits of the company arising from the business in Ontario, after deducting expenses of management, were remitted by the General Manager at Toronto to the said registered office at Aberdeen, where all dividends were declared and paid, and where they were liable to assessment, and were actually assessed under the laws of Great Britain. The corporation of the city of Toronto, acting under the 43 Vict., ch. 27, sec. 3, O., which provides that all personal property within the Province, the owner of which is not resident therein, shall be assessable like the personal property of residents, assessed the plaintiffs for a large amount of personal property.

Held, that the statute was not *ultra vires* of the Provincial Legislature, and that the plaintiffs came within its provisions.

The assessment was therefore held to be valid.

Bethune, Q. C., and *Falconbridge*, for the plaintiffs.

Robinson, Q. C., and *McWilliams*, for the defendants.

LEVICK V. CLAFLIN.

Married woman—Separate trading—Evidence.

On an interpleader issued to try the title to certain goods claimed by the plaintiff, a married woman, as acquired by her in carrying on a trade separate from her husband, in the City of Hamilton, within the meaning of the Married Woman's Property Act, R. S. O., ch. 125, or otherwise, as against the defendants, execution creditors of her husband.

Held, upon the evidence set out in the case, that the plaintiff's title had failed; not only did it appear that the goods with which the business was opened up, which were brought from Cincinnati, Ohio, where the plaintiff and her husband formerly resided, were, according to the law thereof, though claimed by the wife as her's, the goods of the husband, but that the business, though carried on in the name of the wife, was in fact the husband's.

Bruce, (of Hamilton) for the plaintiff.
E. Martin, Q. C., for the defendant.

ABELL V. MCLAREN.

Pleading—Embarrassing pleas—C. L. P. Act.

In this case it was urged that the power to strike out a plea as embarrassing under the C. L. P. Act, R. S. O., ch. 50, was merely confined to the case where the pleading is in its terms embarrassing, *e. g.*, where it is confused, unintelligible, complicated, or involved in statement or otherwise, so as to be difficult to understand, but that it does not extend to cases where, though containing an intelligible defence, the same or a similar defence has already been set up by other pleas on the record, or where it contains unnecessary verbiage or statements of fact, or combines several defences.

Held, that this was too restricted a construction to give to the statute.

Riordan, for the plaintiff.
Ferguson, Q. C., for the defendant.

CLARK V. FARRELL.

Stat. Anne, ch. 14, sec. 1—Claimant of goods seized—Non-removal from demised premises.

In this case, on appeal to the full court, the judgment of CAMERON J., note *ante* p. 80, was affirmed with costs.

Crickmore, for the claimant.
McCarthy, Q. C., and *J. B. Clarke*, for landlord.
Bethune, Q. C., for Sheriff.

TURLEY V. BENEDICT.

Lease—Estate for life—Conditions.

Under an indenture made in pursuance of the Act to facilitate the leasing of lands and tenements, between A. B. of the first part, and D. B. and L. B., his wife, of the second part, it was witnessed that the party of the first par agrees to lease to the parties of the second part certain land described; "to have and to hold during their natural life all the privileges and appurtenances of the above mentioned land, with the exception of the hop yard, &c." "And the party of the second part is to have, hold, work, and enjoy during his natural life, or hers, while they have their natural reasoning faculties, and in their right minds; and should the party of the second part, either, or both of them, be deprived of reasoning faculties or incapable of manual labor, they are to have their support in a comfortable and respectable manner while they shall live, from the party of the first part. Should the party of the second part be incapable of taking charge of the place in his after years, as it should be done by good husbandry, then the party of the first part govern the above mentioned lands as seems best to him. The party of the second part, should he require it, shall have the first privilege of dressing and packing his hops, should he have any to dry, at a reasonable price, after the expiration of Podsfellow's lease; with this exception of the party of the first part, the party of the second part is to have peaceable and quiet enjoyment." At the trial the jury found that after the lease D. B. did not cease to possess his reasoning faculties, &c., but that he did become incapable of manual labor, and was incapable of taking care of the place as it should be done by good husbandry.

Held, that under the indenture a freehold estate for life was conveyed; and that such estate was never defeated, for that the finding of the jury disposed of the contingency of the habendum, which was strictly a limitation, and as to the other provisions of the lease, they could not be deemed to be conditions on the happening of which the estate became forforfeited.

Clute, for the plaintiff.

G. D. Dickson, for the defendant.

Galt, J.] [March 25.

VACATION COURT.

EQUITABLE LIFE ASSURANCE SOCIETY V. WRIGHT.

Principal and Surety.

Held, by GALT J., that the discharge or release by the creditor of one co-surety operates as a discharge of the other co-surety or co-sureties, even although they may be bound by different instruments.

Clement, for the plaintiff.

Hall, for the defendant.

CHANCERY.

Spragge, C.] [March 12.

OUSTEN V. GRAND TRUNK RAILWAY CO.

Railway Co.—Payment for lands taken for road—Pleading—Parties—Demurrer.

An "action for money had and received will lie wherever a certain amount of money belonging to one person has improperly come into the hands of another." Therefore, where a Railway Company paid to the executors of a tenant for life the sum payable for the fee simple of lands taken by the Company for the purposes of their road, and subsequently the remainderman filed a bill against the Company and the representatives of the tenant for life seeking to obtain payment from the Company of the proportion of purchase money payable to the remainderman.

Held, that the executors were properly made parties with a view to the Company obtaining relief over against them in the event of the Company being compelled to make good the money in the first instance, and a demurrer by the executors for misjoinder of parties was overruled with costs, as the bill alleged all facts necessary to entitle the plaintiff to a direct decree against them, although the bill was not framed with a view to a direct remedy against the executors; for "the payment being made by the Company to the executors of the claims of money, to a proportion of which the plaintiffs were entitled; and the payment being made without the authority of the plaintiffs it became money had and received by the executors to the use of the plaintiffs."

Maclennan, Q.C., for plaintiff.

Moss, for defendants.

Spragge, C.] [March 12.

RE JARVIS, Vendor v. COOK, Purchaser.

Sale under power by mortgagee, trustee or assignee in insolvency—Advertising sale—Notice—Statute of Limitations—Payment of taxes.

The rule of law which requires a mortgagee selling under a power of sale in his mortgage to observe the terms of the power of sale, is also applicable to sales by a trustee or *quasi* trustee acting under a power:—the power must be followed; and the rule applies with equal force to sales by an assignee of an insolvent estate, who in such cases acts under a statutory power.

An assignee proceeded to sell the lands of the insolvent without giving notice of such intended sale "for a period of two months" as prescribed by the Act, without obtaining the sanction of the creditors thereto.

Held, a good objection to the title by a purchaser from the vendee of the assignee in insolvency.

Where a vendor was not in possession of lands, the fact that for upwards of ten years he has paid the taxes on the property is not such a possession as is requisite to bar the right of the owner under the Statute of Limitations.

Maclennan, Q.C., for vendor.

Rose, for purchaser.

Spragge, C.] [March 19.

GILLAM v. GILLAM.

Dower—Election—Ignorantia juris, &c

The testator made a provision in favor of his widow, much more advantageous to her than her interest as dowress, and which was expressly given in lieu of dower, and given during widowhood. The will was acted upon for two years, when the widow married a brother of her deceased husband, and thereupon filed a bill alleging that she had accepted the provisions and bequests made for and given to her by the will in ignorance of her right to dower, had she elected to take dower; and in her evidence she swore that she had been ignorant of such right until advised in respect thereof in 1880, shortly before her second marriage, and now sought to have dower assigned to her.

Held, that the rule "*Ignorantia juris neminem excusat*" applied, and the bill was dismissed with costs.

Boyd, Q. C., for plaintiff.

Moss, for defendant.

Spragge, C.] [March 19.

REID v. REID.

Dower—Tenant for life—Interest—Principal.

The general rule is that as between a tenant for life and the remainderman in respect of a charge upon an estate, that the tenant for life is bound to keep down the interest on such charge, and the duty of the remainderman is to pay the principal. This rule was applied where a widow claimed to have dower out of her husband's estate, which at the time of her marriage was subject to certain legacies and a mortgage, in preference to an annuity given her by his will; she being held bound to pay one-third of the interest on these claims until they became payable, after which the remainderman must pay all the interest as well as the principal thereof.

Boyd, Q.C., and *Totten* for plaintiff.

Ball, Q.C., for defendant.

CHANCERY CHAMBERS.

Blake, V. C.] [Sept. 3, 1875.

RE MORSE.

Quieting Titles' Act—Vesting order—Entireties—Husband and wife.

Where a petition, under the Quieting Titles Act, derived title through a vesting order made upon a sale under a decree in an administration suit,

Held, under *Gnnn* v. *Doble*, 15 Gr. 655, that in the absence of proof to the contrary, the order should be assumed to be regular.

Where a deed in a chain of title had been made to a husband and wife as joint tenants.

Held, following *Shaver* v. *Hart*, 31 U. C. R.

603, that notwithstanding the terms of the deed, the husband and wife took by entireties, and where the husband made a conveyance of the land in the life-time of his wife, she merely joining to bar her dower, and predeceasing her husband—

Held, that the husband's deed conveyed the fee.

Where, pending the investigation of the title, the petitioner laid out the land in village lots, and registered a plan—

Held, that the petition must be amended in accordance with the plan.

RE CALLAGHAN.

Quieting Titles' Act—Misdescription.

Where a petitioner under the Q. T. A. claimed title as devisee of certain land, but the description of the land in the will was different to that of the land when reclaimed—

Held, that he might establish a title on shewing a misdescription in the will.

But where a misdescription occurred in a deed—

Held, that the petitioners had merely established an equity to have the deed reformed, and that under the Act the Court could not declare the title as though the deed had in fact been reformed.

Mr. Holmested.

RE RAYNERD.

Quieting Titles' Act—Outstanding undivided interest.

Where the title of a petitioner under the Quieting Titles Act is complete, subject to an undivided interest outstanding in trustees for the benefit of an infant, such interest must be got in by the petitioner, or be declared in the certificate of title to be outstanding.

Blake, V. C.]

RE MORSE.

Quieting Titles' Act—Abstract.

Where, in a petition under the Quieting Titles' Act, it was shewn that the registrations on the whole lot of which the land in question formed a part, number over 560, and that it would take six months and cost $100 to prepare an abstract,

Held, that the abstract might be dispensed with if the affidavit of a P. L. S. were filed, proving that he had examined all the registrations on the lot, and that only certain specified numbers affected the land in question.

Blake, V. C.] [Feb. 25, 1876.

RE FRANKLIN.

Quieting Titles Act—Division Court Bonds—Release of by 36 Vict. chap. 6, sec. 5, O.

All Division Court Bonds made before 1st July, 1869, are effectually released by 36 Vict., ch. 6, sec. 5, O.. as to liabilities incurred thereunder, both before and since that date.

Blake, V. C.] [Sept 7, 1876.

RE PETTEN.

Quieting Titles Act—Tenant for life—Consent.

Where the petitioner under the Quieting Titles Act, has only an estate in fee in remainder, the consent of the tenant for life must be obtained before the petition can be filed.

Proudfoot, V. C.] [June 15th, 1878.

RE MOORE.

Quieting Titles Act—Certificate of discharge—Disclaimer.

A certificate of discharge is of no effect to revert the legal estate until registered. Where a certificate of discharge was lost before registration, *held*, that the disclaimer of the mortgagees, who were trustees, and the consent of their solicitors is not sufficient to enable the Court to declare the petitioner entitled to the legal estate in fee simple.

Blake, V. C.] [Feb. 2, 1879.

RE GILCHRIST.

Quieting Titles Act—Foreclosure—Infants.

Where there was no evidence to show that the infants had been served with a decree of foreclosure reserving to them a day to show cause on attaining their majority, but it was

shown that they had been served with notice of proceedings under the Quieting Titles Act, proof of service of the decree was dispensed with.

Blake, V. C.] [Jan. 1881.

RE DUNHAM.

Quieting Titles Act—Contestant.

A contestant under the Quieting Titles Act must file a petition in his own mame before a certificate can issue in his favor, but he may use in such petition the evidence adduced on the petition in which he was contestant.

Proudfoot V. C.] [Jan. 20, 1881.

GOUGH V. PARK.

Costs—Solicitor and client—Travelling expenses.

Where costs as between solicitor and client were to be paid by the plaintiff to the defendant, and where it appeared that the defendant's solicitor had at the request of his client travelled from Sarnia to Toronto to attend on the examination of the plaintiff,

Held, on appeal from the Master, that the defendant can tax against the plaintiff a sum of $60 paid defendant's solicitor for two days' services and travelling expenses.

Proudfoot, V. C.] [Feb. 12.

RE CUMMINGS.

Quieting Titles' Act—Conveyance after proceedings taken.

Parties to whom land has been conveyed after the registration of the certificate of the filing of the petition and pending the investigation of the title must be substituted as petitioners.

Registrars' abstracts must be continued to the date of the certificate of title.

Blake V. C.] [March 7.

WADSWORTH V. BELL.

Sheriff—Poundage.

The poundage of a sheriff cannot be taken to cover more than the risk and responsibility cast upon him when he seizes, retains, and sells goods, and from this levy returns the money. If the sheriff's action be intercepted it is for the court to say what allowance shall be made him in lieu of poundage.

Hoyles, for plaintiff.

H. Cassels, for sheriff.

Spragge C.] [March 12.

ALLAN V. MCTAVISH.

Fraudulent conveyance—Evidence—Res judicata—Ancient document.

D., the purchaser of land, gave a mortgage thereon to secure part of the purchase money, and subsequently allowed taxes to accumulate on the land, which was sold in order to realize such taxes, when D. bought it and obtained the usual deed to himself. D. having made default in payment of the mortgage, proceedings were instituted thereon, pending which D. conveyed this and other property to his two sons, who gave a mortgage back securing the support and maintenance of D. and his wife, when the plaintiff filed a bill impeaching the transaction for fraud.

Held, (1) that upon the evidence the transaction was fraudulent and void as against creditors; (2) that the judgment at law recovered by the plaintiff against D. was not evidence against the sons being *res inter alios judicata;* but (3) that the production of the original mortgage signed by D. which was more than twenty years old, proved itself under R. S. O. ch. 109, sec. 1., sub-sec. 1, which makes such a document evidence of the truth of the recitals contained therein until shown to be untrue; and therefore it was evidence of the debt due thereunder and could be used as such against the sons.

Proudfoot, V. C.] [March 10.

JONES V. DAWSON.

Tenancy by curtesy—Remainder—Devise—Seisin in law.

Where a testator gave to his children all his real and personal property, to be divided equally when the youngest came to the age of twenty-one, subject to a provision that the wife should have all the rents, profits, and interest to maintain herself and educate and maintain the testator's children as long as she remained his

widow, but if she married again, the greater part of the rents, &c., were to be applied to the benefit of his children, and one of the children, Elizabeth, married and died before her younger brother or sister had attained to 21; but after the second marriage of the widow, and leaving surviving her husband and two sons, on a question as to whether the husband was entitled to money by the curtesy in her share,

Held, (1) that as the widow of the testator married before the death of her daughter Elizabeth, the estate of the latter, when she died, was not a remainder expectant on an estate of freehold; (2) that as Elizabeth took by devise and not by descent, she was technically a purchaser, and her issue could inherit as her heirs without actual seizin in her; (3) that a devise passes an estate as effectually as a feoffment and livery of seizin; (4) that seizin in law will suffice if actual seizin is unattainable; (5) that, therefore, the Master was right in finding the husband entitled as tenant by the curtesy.

Plumb, for the infants.

Watson, for the husband.

Blake V. C.] [March 21.

HAYES v. HAYES.

Appeal—Filing report—Practice.

This was an appeal from the Master's report.

It appeared that the report had not been filed until after notice of appeal had been given.

The appeal was therefore dismissed.

Donovan, for appellant.

Armour, contra.

Blake V.C.] [March 21.

MCCOLL v. MCCOLL.

Administration suit.

A mortgagee of the property in question refused to take his money, his mortgage having some time to run.

The property was sold by direction of the Court for $3,000, subject to the mortgage. The purchaser assumed the mortgage and paid the balance, amounting to $1,700 into Court.

The Master held that the $1,700 was the amount upon which the commission under G. O. 643 was to be calculated.

BLAKE, V. C. held the Master's ruling correct. If the mortgagee had consented to a sale free from his mortgage, commission would have been allowed on the whole $3,000.

H. Symons, for plaintiff.

Plumb, for infants.

COMMON LAW CHAMBERS.

Osler, J.] [March 18.

TATE v. HUBBARD—UNION MUTUAL INS. CO., Garnishees.

Attachment—Attorney—Affidavit—Garnishee disputing liability.

The affidavit to obtain an attaching order may be made by the attorney of the judgment creditor or by a partner of the attorney.

A debt is garnishable where it consists of money due under an award and decree of the Court of Chancery, although the full amount is not ascertained by reason of the costs not having been taxed. When the amount in such a case is finally ascertained, execution may be issued against the garnishee, although he still disputes the liability.

Tilt, for judgment creditor.

Alan Cassels, for judgment debtor.

A. C. Galt, for garnishees.

Osler, J.] [March 18.

CANADIAN BANK OF COMMERCE v. CROUCH, TRUSTEES OF SPADINA AVENUE METHODIST CHURCH, Garnishees.

Attachment—Attorney's lien—Costs.

In garnishee proceedings a court of law will, as against the attaching credior, protect an attorney's lien for costs of the action in which or by means of which the debt attached has been recovered, where the garnishee has notice of the lien.

This rule extends only to the costs incurred in the particular suit or proceeding, and not to the attorney's general costs against the client in other matters.

A court of equity would restrain a creditor who has obtained an attaching order at law from enforcing it against a fund recovered

through a suit in equity to the prejudice of the attorney's lien for costs in that suit.

Mr. Wilson (Morrison, Wells & Gordon), for attaching creditor.

Mr. Morphy, (Morphy, Winchester & Morphy) for the attorney.

COURT OF APPEAL.

March 26.

[To be more fully noted hereafer.]

GAUTHIER v. WATERLOO COUNTY INS. CO.—Appeal by plaintiff from the judgment of Queen's Bench, making absolute a rule *nisi* to set aside plaintiff's verdict, and to enter a verdict for defendants. Dismissed with costs.

HOWARD v. BICKFORD—(Two cases.)—Appeals from the judgments of the Courts of Queen's Bench and Common Pleas, discharging rules *nisi* obtained by defendant in Hilary Term, 1880, to set aside verdicts for plaintiff. Dismissed with costs.

WALTON v. COUNTY OF YORK.—Appeal by plaintiff from judgment of Queen's Bench, ordering non-suit. Allowed with costs.

LIVINGSTON v. WOOD.—Appeal from order of SPRAGGE C. Dismissed with costs.

BLAKE v. KIRKPATRICK.—Aypeal allowed with costs and reference made to Master.

HARRISON v. PINKNEY.—Appeal from the judgment of the Court of Queen's Bench, discharging defendant's rule *nisi* to set aside the verdict obtained by plaintiff, and to enter a non-suit or a verdict for defendant. Dismissed with costs.

MOORE v. JOHNSTONE.—Appeal dismissed with costs.

DUFF v. CANADA MUTUAL INSURANCE CO.—Appeal from the order of PROUDFOOT, V. C. Dismissed with costs.

REPORTS.

ONTARIO.

ELECTION CASES.

MCMONAGLE v. COONS.

Municipal election—Prosecution for voting more than once for mayor—Inspection of ballot papers—Municipal Act ss. 150, 158.

Action to recover two several penalties of $50 each for having, at an election for the Mayoralty of Prescott, after having already voted, twice voted at other polling places.

Upon an application for inspection of ballot papers, &c.,

Held, (1) That this was a prosecution for an offence in relation to ballot papers, and that the order for inspection could be made under sec. 158 of the Municipal Act.

2.—That such inspection was inadmissible to obtain information as to votes given by any person other than defendant, no prosecution having been instituted against such person.

3.—That even if this prosecution did not fall within the terms of sec. 158, inspection of the voters' list and other papers mentioned in subsection (*g*) to sec. 150 of the Municipal Act, could be ordered by the county judge.

[Brockville, January, 1881

The plaintiff obtained a summons calling upon the clerk of the municipality and the defendant to show cause why the clerk should not produce for inspection the several sealed packets o ballot papers, &c., made up under sec. 150 of the Municipal Act, containing the voters' lists used at the several polling places at the election for mayor, &c., and allow the same and the list of voters and the contents thereof to be inspected by the plaintiff, &c. Also ordering the clerk in the meantime not to destroy the ballot papers, &c., and calling upon the clerk to show cause why he should not produce to this court, at the trial of this cause, the said several packets, &c. and all the contents.

The summons was granted upon an affidavit of the plaintiff stating among other things his belief that defendant on 3rd January, 1881 voted for mayor after having already voted for him at some other polling place, and voted a third time after having already done so at two other polling places; that he had caused a suit

to be entered for the recovery of the statutory penalty; that he believed an inspection and production of such ballot papers and particularly of the several packets marked G. containing the voters' lists used at said election was required for the purpose of maintaining the prosecution of this suit, etc.; that he believed there were several other electors other than defendant who voted at more than one polling place for mayor.

M. E. O'Brien, for defendant. This is not a prosecution for an offence in relation to ballot papers or a petition questioning an election or return. All papers mentioned in sub-secs. to sec. 150 are "ballot papers," and can only be inspected for the purposes mentioned in sec. 158, and not for any other purpose.

This application is of a fishing nature.

French, contra. This is a prosecution for an offence in relation to ballot papers. The cause of action is called an "offence" in sec. 136. It is an offence in relation to ballot papers inasmuch as the defendant was guilty of an offence if he took a ballot paper from the deputy returning officer for the purpose of voting for mayor after having already voted for mayor at another polling place. Even if the plaintiff is not entitled to an order to inspect the ballot papers he is entitled to one to inspect the voters' list and other papers mentioned in subsec. (*g*) to sec. 150 of the Act, and the plaintiff is entitled to an order for inspection under the general jurisdiction of this Court. See sec. 175 C. L. P. Act. and sec. 244 of Div. Court Act.

McDONALD, Co. J.—Upon the argument I was inclined to think that the production and inspection of ballot papers asked for could not be ordered, as I took much the same view of the 158th section as Mr. O'Brien contended for. I differed from him as to all the papers mentioned in the sub-sections to section 150 being "ballot papers." I thought then, and think now, that the voters' list and other papers mentioned in sub-section (*g*) are not referred to in, or covered by, the 157th or 158th sections of the Act, and I agree with Mr. French in his contention that under the 244th section of the Division Courts Act I could make an order for their production and inspection so long as the same was not prohibited in the Municipal Act. But upon a full consideration of the 158th section I have decided that this action is "a prosecution for an offence in relation to ballot papers."

The learned Judge then referred to the following sections of the Municipal Act: Secs. 118, (ss. 3,) 128, 139, 140, 141, 143, 150, 157, 133, 135.

Now, if the defendant did vote more than once for mayor at the election referred to, he has certainly committed an "offence," for so it is characterized in the 136th section. Is such "offence" an "offence in relation to ballot papers?"

If the requirements of the Act were complied with, and the defendant was permitted to vote for mayor three times, he must have received from the deputy returning officer, on each occasion, a ballot paper containing the names of the candidates for mayor, (Prescott has not any Reeve or Deputy), and not containing the names of the candidates for councillors. Pursuant to the 139th section, the deputy returning officer, at each polling sub-division, must have signed his name or initials upon the back of the ballot paper, and have delivered the same to defendant, and have placed in the column of the Voters' list headed "Mayor," or "Mayor and Reeve" a mark opposite defendant's name to denote that he had received a ballot paper for mayor. If the provisions of the 143rd section were complied with, the defendant did not take the ballot paper so received out of the polling place. If he declined to vote, the deputy returning officer would have written "Declined" upon the ballot paper and preserved it. If the defendant deposited the ballot paper in the ballot box, it must at the close of the poll have been allowed or rejected, and in either case must have been sealed up and returned to the clerk of the municipality. In my judgment, the defendant, if he obtained from a deputy returning officer more than one ballot paper for mayor, with the intention of using same to vote, and did vote; or if he obtained from each one of three deputy returning officers such a ballot paper with such intention, and did vote, was guilty of "an offence in relation to ballot papers."

I next come to the question of whether the production and inspection asked for can be ordered and if so, should such order be made. I think under secs. 136 and 158 that the order can be made. Then ought it to be made? I think it ought in so far as concerns this present action. The 158th sec. provides for the order being made upon the court or judge "being satisfied by evidence on oath that the inspection or production

of such ballot papers is required for the purpose of maintaining a prosecution for an offence in relation to ballot papers." The plaintiff's affidavit covers the necessary ground and furnishes the evidence required to satisfy me. And it seems clear that unless such an order is made, this prosecution, supposing the defendant to be guilty, could hardly be successfully maintained, for then the only evidence which the plaintiff could adduce would be such as might be furnished by admissions or statements of the defendant; and provided the same were obtained at the trial they would probably be rendered useless by the defendant claiming the benefit of sec. 211 of this Act. I may, in passing, remark that this fact furnishes another argument in favor of this being a case in which a production and inspection may be ordered, for otherwise the Act would declare a certain action to be an offence and provide a penalty for it, and yet not only not provide a means of proving the commission of the offence, but actually prohibit the obtaining of such proof, (see secs. 158 and 211).

In so far as this application is made for the purpose of ascertaining whether there were others than defendant who voted at more than one polling place for mayor, I unhesitatingly refuse it. I have more than once held on application made to me for the purpose of obtaining a re-count of ballots under the Act, that the same could not be granted unless "a petition questioning an election or return," had actually been filed. One such decision has, I believe, been reported (see 13 C. L. J. 44). And I also hold that where an inspection is granted for the purpose of maintaining a prosecution, it must be a prosecution actually commenced or instituted.

In considering whether the offence charged n this case is "an offence in relation to ballot papers," I have not been unmindful of this being a penal action, and of the enactments of the 160th section, or of the contention that might arise that the offences in that section mentioned are those in a prosecution for which the legislalature intended that a production or inspection should be ordered. But if confined to such a prosecution, the difficulty as to evidence in a prosecution for voting more than once in an election for mayor, to which I have already above referred, would arise.

The summons will therefore be made absolute to this extent: an order will go for the production for inspection, and inspection on a day to be therein named and upon such conditions as shall be therein named, of the ballot papers and other papers returned to the clerk of the municipality, in so far as the same concern or affect any vote or votes for mayor given by defendant, (if so given). In and by the summons the clerk has already been ordered not to destroy the ballot papers, &c., until otherwise ordered, and to retain the same until otherwise ordered. That order to be continued. The order also to provide for the production at the trial of this cause of the said several packets of ballot papers and the voters' lists, and other papers returned by the deputy returning officers to the clerk of the municipality.

THE SUPREME COURT OF CANADA.

GENERAL RULE.

Wednesday, the Sixteenth day of March, A.D. 1881.

It is ordered:

1. That Rule Eleven be and the same is hereby amended by striking out the word "immediately" at the beginning of such Rule.

2. That Rule Fourteen be and the same is hereby amended by striking out the words "one month" therein contained, and by inserting in lieu thereof the words "fifteen days."

3. That Rule Fifteen be and the same is hereby amended by inserting after the words "and mailing," where they occur in such Rule, the words, "on the same day," and by striking out the words "in sufficient time to reach him in due course of mail before the time required for service."

4. That Rule Twenty-three be and the same is hereby amended by striking out the words "one month" at the beginning of said Rule, and by inserting in lieu thereof the words "fifteen days."

5. That Rule Thirty-one be and the same is hereby amended by striking out the words "one month where they occur in said Rule, and by inserting in lieu thereof the words "fourteen days"; and by adding at the end of said Rule the words "but no appeal shall be so inscribed which shall not have been filed twenty clear days before said first day of said Session, without the leave of the Court or a Judge.

6. That Rule Sixty-two be and the same is hereby amended by striking out the words "two weeks," and by inserting in lieu thereof the words "fifteen days."

7. That Rule Sixty-three be and the same is hereby amended by striking out the words "one month's" where they occur in said Rule, and by inserting in lieu thereof the words "one week."

(Signed) W. J. RITCHIE, C. J.
S. H. STRONG, J.
T. FOURNIER, J.
W. A. HENRY, J.
JOHN W. GWYNNE, J.

Canada Law Journal.

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DIARY FOR APRIL.

3. Sun....5th Sunday in Lent.
4. Mon...County Court Terms begin, County Court sitt. without jury (ex. York) begin.
5. Tues...Canada discovered, 1499.
8. Fri.....Supreme Court Act assented to, 1875.
9. Sat.....County Court Terms end.
10. Sun.....6th Sunday in Lent.
17. Sun.....Easter Sunday.
22. Fri.....Beaconsfield Ministry resigned.
23. Sat....St. George's Day.
24. Sun....Low Sunday.
25. Mon...St. Mark
26. Tues....2nd Intermediate Exam.
27. Wed...2nd Intermediate Exam.
28. Thurs..1st Intermediate Exam.
29. Fri....1st Intermediate Exam.

TORONTO, APRIL 15th, 1881.

WE regret to record the death of His Honor Judge Macdonald, of Guelph. He had been on the Bench for twenty-four years, and was a member of the Board of County Judges. He was a man of sound common sense, a good lawyer and much respected by his many friends. We publish in another place, resolutions of the Bar of his County on the occasion of his death.

A TREATISE on the Law of Dower, with statutes, forms, pleadings, &c., is in preparation by a barrister of Osgoode Hall. We have had nothing on this subject since Mr. Draper's little book, published many years ago. It may be impossible for us for many years to come to do away with the cumbrous provision of the Common Law for wives, known to rustics as their "thirds," but we have often seen a pleasant smile light up the face of the "worse half" owning lands in Manitoba when told that in those happy hunting grounds dower is unknown, and that the apocryphal silk dress known here as a sure solatium for the "better half" remains unasked.

A LAW Society has recently been organized in Montreal. We cannot speak with any authority as to the necessity or cause for this movement; but we cannot forbear coupling the remarks so frequently made as to the alleged decadence of the "Bench and Bar" in our sister Province (speaking generally, and aware of the many brilliant, learned men amongst them) with the fact that the system there adopted is one of *decentralisation*, as ours is the reverse. Our brethren in the Lower Province have many difficulties to contend with; but not the least is the evil alluded to. It is impossible to have the same high standard where the Bar is broken up into a number of small sets, as where there is one central spot such as we have in Osgoode Hall.

The following are the officers of the "Montreal Law Society:"—President, A. Lacoste, Q.C.; Vice-President, T. W. Ritchie, Q.C.; Treasurer, Simeon Pagnuelo, Q.C.; Secretary, F. L. Beique; Committee, R. Laflamme, Q.C., J. M. Loranger, Q.C., J. J. Curran, Q. C., C. P. Davidson. Q.C., C.A. Geoffrion, Q.C. We hear that a large section of the Bar is not in sympathy with the action taken.

THERE has also been an agitation, principally amongst the English section of the Bar, in connection with the vacancies on the Bench. The desire seems to be to have the appointment of a judge to the Superior Court made with especial regard to his acquaintance with commercial law. At a large meeting of the English speaking members of the Bar, at Montreal, several resolutions embodying the views of the meeting were passed. A deputation subsequently proceeded to Ottawa and laid the matter before the Government. The following were the resolutions:—

"Moved by Mr. Tait, seconded by Mr. Dunlop,

"That inasmuch as Montreal is the centre of the commerce not only of the Province of Quebec, but also of the Dominion of Canada and that in the Superior Court of Montreal, the commercial cases therein tried are of great importance, it is extremely desirable in the interest of the administration of justice that the seventh judge to be appointed to the Superior Court should be an advocate having large experience in commercial cases."

Carried.

It was then moved by Mr. W. H. Kerr, Q.C., seconded by Mr. Burroughs:

"That in the opinion of this meeting, the system of political appointments to the Bench has inflicted great damage on the Province, and that this meeting protests against the continuance of the practice, especially with regard to the Court of Queen's Bench."

Moved in amendment by Mr. T. W. Ritchie, Q.C., seconded by Mr. G. B. Cramp:

"That this meeting is of opinion that questions respecting political appointments ought to be considered at a regular meeting of the Bar and not by any section thereof."

Moved in amendment to the amendment by Mr. D. Macmaster, M.P.P., seconded by Mr. J. N. Greenshields:

"That in the opinion of this meeting a representation should be made to the Dominion Government that the judicial appointment about to be made should be without regard to any considerations but personal worth and professional skill, and that in making such appointment the claims of the English section of the Bar should be fully considered."

The amendment to the amendment was then put and carried by a large majority.

Mr. Kerr then withdrew his motion.

Mr. Macmaster moved, seconded by Mr. J. S. Hall,

"That the Chairman name a committee, of which he himself should be one, to lay the views of this meeting before the Dominion Government."

Carried.

MR. JUSTICE BRAMWELL has recently written a letter to the *Times* over the signature "B" on the subject of Law Costs. The remedy he proposes is that "solicitors should be paid a lump sum; for instance, so much if proceedings stopped at the writ, so much if they stopped at a further stage, so much if there was a trial; and this sum should vary according to the amount at stake and other circumstances."

A writer in *St. James Gazette* takes exception to this suggestion, and after rather cleverly pointing out some objections, takes up the subject of the bench and suggests that judges should be rewarded according to the value of the work they do and not by the year, and that a reduction should be made whenever they refer a cause or wrongly decide points of law. He thus continues:—

"Of course to a certain number of blunders each judge would be entitled without charge, just as men engaged on piecework are allowed to make a certain percentage of 'wasters.' The House of Lords, like the King, cannot err, and needs, therefore, no consideration. To a lord justice I would allow three mistakes per annum gratis; after that I would charge him £500 for each; this being, after all, a moderate computation of the damage he has done. To vice-chancellors and 'ordinary judges,' as they call themselves now, I would freely allow ten mistakes at *Nisi Prius*, because of the noise there, and the necessity of humouring the jury; in *banc* five blunders per annum. If this quantity were exceeded, then I would deduct £100 for each error; but if more than twenty blunders were made on the whole, I would impose a fine of £2,000 for this number, with exclusion from the Lord Mayor's dinner. To County Court judges I would be more liberal yet; and to justices of the peace I would concede immunity if they were right one time in five."

THE Supreme Court of the United States has recently decided a most important constitutional question as to the limits of the power of either House of Congress to commit a contumacious witness for refusing to answer inquiries into his private affairs. The learned and elaborate judgment of Mr. Justice Miller is reported *in extenso* in the *Albany Law Journal*, (*Kilbour* v. *Thompson*, 23 Alb. L. J. 227,) and as his reasonings are based to a great extent either on decided English cases, or on general principles affecting the constitution and powers of representative assemblies, they are well worth the attentive consideration of our readers. The action was one of trespass for false imprisonment, brought against the sergeant-at-arms of the House of Representatives, and certain members of that House who had been appointed a Committee to inquire into the affairs of a bankrupt firm of which the United States was a creditor. The plaintiff, who had been subpœnaed as a witness by the Committee, refused to answer certain inquiries, and to produce records relating to the matters required of him.

The sergeant at-arms pleaded a special plea of justification founded on the fact that he had acted under the orders of the House of Representatives; and the other defendant pleaded a similar plea, except that they alleged that they were members of the House, and had acted in that capacity. To these special pleas the plaintiff demurred, and his demurrer has now been allowed by the highest legal tribunal, so far as the plea of the unfortunate sergeant-at-arms is concerned, while the other defendants who caused all the trouble escape under the friendly mantle of 'privilege,' which can apparently become on occasion as useful to over-zealous Congressmen as to obstructive Home Rulers. This, however, was merely a side issue, and does not touch the really important point decided by this case, which is that the House of Representatives can only punish a witness for refusing to answer inquiries which it is within their jurisdiction to make, and that private matters do not come within this category.

JUDICIAL CHANGES IN ENGLAND.

Sir Henry Jackson, Q.C., and Mr. Mathew were, on the 2nd and 3rd of March respectively, appointed to the vacant seats on the English Bench. On the 8th March Sir Henry Jackson died of heart disease, being not quite fifty years of age, and before he had taken his seat or been sworn in.

The appointment of Mr. Mathew is spoken of as another of the few instances of a member of the junior bar (*i.e.*, a stuff-gownsman), being elevated to the Bench. He had a large commercial business and did a large counsel business in Common Law Chambers.

Mr. William Lewis Cave, Q.C., has been appointed to fill the vacancy in the Queen's Bench Division caused by the death of Sir Henry Jackson. His appointment seems to give general satisfaction. A contemporary thus speaks of him:—"Mr. Cave is the editor of 'Addison on Torts,' of which the fifth edition was recently published, and of the titles from 'Indictment' to 'Promissory Notes' in 'Burn's Justice,' and has a high reputation as a lawyer; while the dignity of the bench, and the good feeling between the judges and the profession—no unimportant matters—are safe in his keeping. In point of age, Mr. Justice Cave is still young enough to have lost none of his freshness."

Vice-Chancellor Malins has retired from the Bench. The *Law Journal* thus speaks of his judicial career:—"The learned judge is justly most popular with the legal profession, and throughout his career on the bench has been guided by an earnest desire to do justice. He would have earned a higher reputation as a lawyer if he had lived in the times before the system which he had to ad-

minister became stereotyped. He had all the instincts of justice, tenacity of purpose, and disregard of opposition, which would constitute a founder of the system of equity. These very qualities stood in his way as a judge in these latter days, so that his reputation as a lawyer was hardly equal to his powers."

Rt. Hon. Sir Arthur Hobhouse, K.C.S.I., has been appointed an unpaid member of the Judicial Committee of the Privy Council. In 1872, he succeeded Sir James (now Mr. Justice) Stephen, at Calcutta, as the legal member of the council of the Governor-General of India.

LEGISLATION OF LAST SESSION.

A much valued correspondent at Ottawa thus writes to us *apropos* of the legislation of last session. We gladly reproduce part of his letter:—"Our list of survivors of the Legislative battle is not very numerous, and severely critical people will say 'so much the better.' We got up to 107 Bills entered and read, at least once, so that 44 died the death of the Innocents, and 44 Rachels mourned for their children, and will not be comforted. One poor little dear, only legislative child of Mr Patterson, of Essex, died *in print* but unintroduced, 'and went down to the grave unborn.' The fate of these Innocents was hard. 'The applause of list'ning senates to command, their fate forbade.' But perhaps the public will add, as a consolation,

'Nor circumscribed alone
Their hidden virtues, but their sins confined,
Forbade to puzzle justice on her throne,
Or pour confusion o'er the legal mind.'

Their country will hardly go into deep mourning for them.

I hope you are all well pleased with Mr. Mowat's fusion of law and equity. I see two learned gentlemen intend to indite commentaries upon it; yet it seems pretty considerably full in itself, and nearly long enough. I am very glad to see it, and to think that the foreign sneer about Englishmen having two laws or two opposite rules of decision in the same case, will no longer be applicable. I send you a copy of Mr. Mills' bill for establishing the rule of decision in the North-western Territories. Is Mr. Mowat's an amplification of Mr. Mills', or Mr. Mills' a condensation and quintessence of Mr. Mowat's, or a germ out of which a clever lawyer, with plenty of brains and enormous labor, could evolve Mr. Mills' measure? I remember Mr. Draper's idea of the immense extent of the labor involved in this fusion, and his saying it was enough to deter him from undertaking it; though he thought the thing ought to be done, and this blot on English jurisprudence removed. All honor to those who have removed it. There will be in Ontario as there has been in England, trouble enough at first: old lawyers will not much like it, but all will come right, and the next generation will wonder how we bore the reproach so long."

There are some who think that we were doing well enough without this much-needed fusion, and that there was no urgent demand for the change. It certainly will entail much labor on Bench and Bar, and probably make litigation rather more expensive than formerly.

ELECTION OF BENCHERS.

This event has come and gone, and we are glad it is over. These occasional appeals to the general body of the profession may be desirable for some reasons; but the medicine is unpleasant and somewhat nauseous, and if there is a little unseemly spluttering, and some soiling of white robes on the part of the patient during the process, it is only what might have been expected. It is said by some that a dash of politics in the mixture is what gave it an offensive flavor on this occasion. We trust that this is not the case, and while we ask pardon for mixing metaphors, we express disbelief in the assertion that there can be in our ranks any pre

fessional man so insane as to introduce an enemy into the citadel when we have all we can do to withstand the hostile army outside. If politics have been introduced, we may, when the mischief is done, witness an unseemly wrangle, suggestive of small boys each accusing the other of beginning the fight.

The following are the gentlemen who have been elected, with the number of votes given for each :—

W. R. Meredith, Q. C.	541
D. McCarthy, Q. C.	518
James Bethune, Q. C.	510
D. B. Read, Q. C.	508
Thomas Ferguson, Q. C.	490
Daniel McMichael, Q. C.	465
F. McKelcan, Q. C.	456
James Maclennan, Q. C.	433
John Hoskin, Q. C.	423
Charles Moss	404
Thos. M. Benson	403
Thos. Robertson, Q. C.	360
J. K. Kerr, Q. C.	352
Hector Cameron, Q. C.	341
Æ. Irving, Q. C.	337
B. M. Britton, Q. C.	336
John Bell, Q. C.	321
H. A. Hardy, Q. C.	319
J. J. Foy	307
H. W. M. Murray	300
Stephen Richards, Q. C.	298
T. B. Pardee, Q. C.	284
Edward Martin, Q. C.	283
James F. Smith	277
W. H. Scott, Q. C.	268
John Crickmore	262
J. H. Ferguson	255
David Glass, Q. C.	248
Andrew Lemon	229
Larratt W. Smith, D.C.L.	227

There are five new names on the list: Messrs. H.W. Murray, J. F. Smith, J. J. Foy, J. H. Ferguson, and David Glass, Q.C. The first four were put forward as representatives of the Junior Bar, though it is worthy of remark that Mr. Murray has been at the Bar since 1859, and Mr. Smith since 1860, whilst Mr. Osler and Mr. C. Moss, who were appointed by the Benchers last year to fill vacancies, were only called in 1862 and 1869 respectively. We recognize, however, in the election of the gentlemen alluded to, a desire on the part of the profession to carry out the action commenced by the old Bench, and to put into practical shape the subject which has been so persistently urged in these columns, namely, some measure of protective justice to those who are enrolled in our ranks and are now at the mercy of an army of irresponsible invaders. We are at the same time compelled to notice that another result has been to turn out three country representatives, and put Toronto men in their places.

There were about 650 voting papers sent in, of which 53 were rejected as informal or of persons not entitled to vote. The names next on the list were J. E. Rose, 224; J. A. Henderson, Q. C., 213; J. A. Boyd, Q. C., 213; James Beatty, Q. C., 197; R. Lees, Q. C., 192; E. J. Parke, 189; James Gilt, 185. After them came upwards of one hundred more who received votes ranging from 170 down to one.

We miss the names of many who would have made excellent Benchers; but some of them will doubtless hereafter be added to fill the places of those who may not attend to their duties. We trust the rule in this behalf will be more rigidly enforced.

The duty of the Scrutineers, the Treasurer, Mr. D. B. Read, and Mr. Crickmore were very arduous, as will be evident when we state that some eighteen thousand votes had to be counted, and that six days of hard labor were occupied in the scrutiny.

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT.

NORTH ONTARIO ELECTION PETITION.
WHEELER v. GIBBS.

Parliamentary Election—Costs—Set-off.

The respondent having succeeded in having his election petition against the return of the appellant maintained with costs, but who, on appeal to the Supreme Court (which appeal was limited to the question of disqualification), was condemned to pay the costs of appeal, moved in the Supreme Court to set off the taxed costs of the respondent in the court below against the taxed costs of the appellant in the Supreme Court.

The Court ordered that the costs taxed and allowed to the appellant in this Court be set off against the costs which may be taxed and allowed to the respondent in the Court below by the proper officer thereof on the taxation of said costs, and be a satisfaction *pro tanto* of the said last-mentioned costs when so set off, and that all proceedings on the execution issued in this cause out of the Supreme Court be stayed.

H. Cameron, Q. C., for Respondent.

McTavish, for Appellant.

COURT OF APPEAL.

C. C. Hastings.] [March 23.

IN RE LEWIS, INSOLVENT.

Insolvent Act of 1875—Recovery of debts under sec. 68.

Where certain creditors of the insolvent take proceedings under sec. 68 of the Insolvent Act, 1875, in the name of the assignee, to recover a debt due the insolvent, they are entitled to the amount recovered, and the estate cannot benefit by the recovery in any way unless indirectly, when the creditors' claims are extinguished thereby, and consequently their right to receive further dividends from the estate is gone.

Where in such a case the debt was paid to the assignee, who refused to pay it to the creditors who had taken the proceedings to recover it:

Held, that their proper remedy was by application to the Judge of the Insolvent Court.

Maclennan, Q.C., for the appellant.

J. K. Kerr, Q.C., for the respondent.

Appeal dismissed.

Q. B.] [March 26.

HARRISON v. PINKEY.

Lease—Proviso on determination—Option to harvest crops, or be paid for—Construction.

A lease from D. to the plaintiff of a farm contained the following proviso, "And the said lessee agrees to give up possession of said premises before expiration of lease, if sold by said lessor, upon receiving six months' notice, said notice to be given before 1st April, and should the said lessor give the said lessee notice to quit premises during any year of said lease, then the said lessee will have the privilege of harvesting and threshing the crops of the summer fallow, or the work done on said summer fallow will be paid for at a fair and reasonable valuation." D. agreed to sell the land to the defendant on 22nd August, 1877, and on the same day gave the plaintiff notice to quit possession on the 1st April, 1878. Plaintiff then put in a crop and quitted possession pursuant to the notice, and the land was conveyed to the defendant in the latter month. Neither D. nor the defendant offered to pay for either the work or the crop.

Held, affirming the decision of the Court below (44 U. C. R. 509), that the construction of the proviso was that the tenant was to have the privilege of harvesting any crops which might have been put in on the summer fallow, unless the landlord elected to pay for them at a valuation; that he had never parted with his property in the crop, and that he was therefore entitled to recover in trover against the purchaser of the farm.

Per PATTERSON, J. A. If the lessor elected to pay for the work he was bound to do so when he gave the notice, or at latest when he resumed possession.

Tilt, for appellant.

C. Robinson, Q.C., for respondent.

Q. B.] [March 26.

GAUTHIER v. THE WATERLOO MUTUAL INSURANCE COMPANY.

Insurance—Further insurance—Mistake.

The assured under a policy containing a condition "that the company is not liable . . . if any subsequent insurance is effected in any other company unless and until the company assent thereto by writing signed by a duly authorized agent," effected an insurance with the Mercantile Insurance Company, which was void at their option on account of a similar condition, the policy with the defendants not having expired as a matter of fact, though plaintiff was led to believe it had.

Held, affirming the judgment of the court below (44 U. C. R. 490) that the plaintiff could not recover, for in point of fact there was a further insurance which was voidable only and not void; and the defendant's liability was not dependant upon whether the Mercantile Insurance Company's policy was finally to be adjudged valid or not, the stipulation as to further insurance being designed to apply to all cases of policies subsequently existing in point of fact without reference to their validity or effect.

Crickmore, for appellant.

Bowlby, for respondent.

Q. B. and C. P.] [March 26.

HOWARD v. BICKFORD.

Principal and agent — Sale on commission—Right to commission.

The rule that the agent is entitled to his commission only upon a due and faithful performance of all the duties of his agency in regard to his principal, is not applicable to this case where the commission had been earned, and the relation of principal and agent had ceased, the alleged omission of duty being that the agent did not report to his principal a difference of opinion expressed by a party to the contract as to its construction.

The plaintiff as agent of the defendant bought from the G. W. R. Co. a quantity of rails for which he was to receive one dollar per ton commission, payable one half when the defendant should sell them, and the balance when he should receive payment for them. The defendant having failed to sell them, appropriated them by laying down some upon, and distributing the remainder along a road in which he had a controlling interest.

Held, that the plaintiff was entitled to his commission.

The defendant believing, and being led by the plaintiff, who was acting *bona fide* in so representing, to believe that the advantage which he would gain on a re-sale was extravagantly large, offered in addition to a commission on a purchase of the rails, the sum of $1,000, which was paid by draft drawn by the plaintiff upon, and accepted and paid by the defendant. The defendant believed that the $1,000 was to be illegally used by the plaintiff in effecting the purchase, and the plaintiff, knowing this, left him under that impression. The expected advantage was not obtained.

Held, that the defendant was not entitled to recover back the $1,000.

H. Cameron, Q.C., for the appellant.

E. Martin, Q.C., for the respondent.

C. P.] [March 26.

WALTON v. THE CORPORATION OF THE COUNTY OF YORK.

Negligence—Ways—Ditches—Obligation to fence or grade.

Action for negligence in not keeping in repair a county road. The plaintiff in driving along the road was carried into the ditch by his horse, which shied at some object. The travelled portion of the road, which was thirty feet wide, sloped gradually from the crown to the edge of the ditch, which was four feet wide —2½ at the bottom, 18 inches deep, measuring it from its edge. At the trial the plaintiff obtained a verdict for $400, and the Court below made absolute a rule for a non-suit, (30 C. P. 217), which also asked in the alternative for a new trial, holding that the having no guards or railings to the ditch was no evidence of neglect to keep the road in repair.

Held, that the question whether or not such a place required protecting guards, was a question of fact, and as there was some evidence of danger here, the case was not one that could properly have been withdrawn from the jury, and the appeal was therefore allowed.

The question of fact to be determined is, whether the road, having regard to all proper considerations, was in a state reasonably safe and fit for the ordinary travel of the locality.

The case coming on as it did, before this Court, the question of a new trial was left untouched. See *Hamilton* v. *Myles*, 24 C. P. 325.

Donovan, for plaintiff.

J. K. Kerr, Q. C., for defendants.

Spragge C.] [March 26.

LIVINGSTONE v. WOOD.

Appeal upon questions of fact—Balance of testimony.

The Court below, having found upon the evidence (27 Gr. 515) that the plaintiff was entitled to redeem a bond for $4,000, assigned to the defendant to secure $2,000, the defendant giving a separate agreement to re-assign on payment of the loan and interest;

Held, that though the evidence as printed appeared to favor the defendant's view, yet not to such an extent as to show clearly that the learned judge who saw the witnesses was wrong, the decree should not be disturbed.

Osler, Q. C., for the appellant.

W. Cassels, for the respondent.

Proudfoot, V. C.] [March 26.

BLAKE v. KIRKPATRICK.

Contract of hiring—Rescission of contract.

The plaintiff agreed with the defendant to serve him as manager of a tannery for six years, the agreement reciting that he was a practical tanner and was to manage the works, while the defendant was to furnish the capital. He also agreed to disclose to the defendant a secret way of tanning, which defendant was not to use after the agreement, except in connection with plaintiff, and the secret process was to be carried on in the works.

The defendant discharged the plaintiff in about seven months, alleging among other things that he was not a practical tanner, that he was not using the secret process, and that he had not disclosed that process to the defendant.

Held, reversing the judgment of PROUDFOOT, V. C. (27 Gr. 86), upon the evidence that the plaintiff was a practical tanner within the meaning of the agreement; that the manufacture of leather was being carried on according to the secret process, and that as no time was limited for disclosing the secret process the plaintiff was not in default, and therefore the defendant, who had never asked for the disclosure, had no right to dismiss the plaintiff for non-disclosure. A reference was therefore directed as to the damages sustained by the failure of the defendant to perform his part of the agreement, and for the dismissal.

W. Cassels, for the appellant.

McMichael, Q. C., for the respondent.

Proudfoot, V. C.] [March 26.

DUFF v. THE CANADIAN MUTUAL INSURANCE COMPANY.

Mutual insurance companies—Separate branches—Guarantee capital fund—Liability of policy holders.

The defendants, a mutual insurance company, had divided their business into several branches, pursuant to the Act, and had raised a guarantee capital fund. All losses were paid out of the guarantee fund. In two branches in which the policies were cancelled, it was proved that the amounts to be collected on the premium notes would not pay the losses in those branches.

Held, affirming the decision of PROUDFOOT, V. C. (27 Gr. 391), that the policy, holders in the solvent branches were not liable in respect of any sums paid for losses appertaining to other branches, but merely for the balance of any which may be found due from them respectively for moneys paid out of the guarantee fund for their losses and expenses.

Semble, that whether the power of assessment was to be exercised in the discretion of the directors, or was obligatory upon them, it is not in the power of the Court of Chancery to do what the Directors might or should have done.

Duff, for plaintiff.

E. Martin, Q. C., *R. Martin*, Q. C., *Osler*, Q. C., *Gibson*, and *Laidlaw*, for defendants.

Blake, V.C.] [April 11.

SIMONTON v. GRAHAM.

Mortgage—Interest after maturity—Master's Office—Practice.

In a foreclosure suit, the proviso in the mortgage was for payment of the principal "in three years from the date hereof, with interest at ten per cent., payable half-yearly."

On the reference, the Master allowed the plaintiff interest at ten per cent. up to the time the mortgage matured, and six per cent. afterwards.

Held, following *Dalby* v. *Humphery* and *Cook* v. *Fowler*, L. R. 7 H. L. 27, that where no rate of interest is fixed by the mortgage for payment after maturity, interest thereafter is awarded as damages for breach of contract; that *prima facie* the rate of interest stipulated for up to the time certain would be taken, but that would not be conclusive; that the onus then lay upon the person seeking to reduce the rate reserved to show that it was more than the ordinary value of money.

The case was referred back to the Master to take evidence as to such value. If the Master alters his former finding, costs to respondent; if he does not, costs to appellant.

Armour for appellant.

Hoyles for respondent.

COMMON PLEAS.

VACATION COURT.

Osler, J.] [March 11.

THE MONTREAL CITY AND DISTRICT SAVINGS' BANK v. CORPORATION OF PERTH.

Debenture—Conditions precedent—Presentation and surrender—Damages—Pleading.

In an action on a debenture for £200 sterling, by which defendants agreed to pay bearer at the office of a named bank and on a day named, upon presentation and surrender of the debenture at the said office, alleging that the plaintiffs became the lawful holders and bearers thereof, before maturity, and that all conditions precedent were performed, &c., and averring as a breach the non-payment of the said principal sum.

Held, by OSLER, J., that the presentation and surrender of the debenture at the said office, on the said date, were conditions precedent to the plaintiff's recovery, but that interest, being merely an accessary to the principal sum, need not be claimed as damages in the declaration, and that therefore it was no departure for a replication herein to show for the first time, that damages or interest was all that was claimed; but that it was a departure for the replication to allege presentation on a day later than that named in the bond, the allegation of performance of conditions precedent in the declaration, including such presentation, &c., on the day named.

A plea after traversing the presentation of the debentures, &c., alleged that it was afterwards paid, and was then duly surrendered and delivered up.

Held, a good plea, because by the exceptions taken to it the payment of principal debt was admitted, and no more than nominal damages, if any, could be recoverable; that payment or satisfaction of the debt would include the nominal damages for its detention, and that the surrender would show that the payment was in satisfaction and discharge of the debt, if not also of the damages, and that it was no answer that the surrender was by inadvertence or oversight when the surrender was intentional, but that it would be a good answer that the delivery up was on the agreement and understanding that the right to claim such damages was reserved, as the surrender would then be not for the purpose of cancellation, and with the intention of not yielding the right, if any, to damages.

S. Richards, Q. C., for the plaintiffs.

R. Smith (of Stratford), for the defendants.

CHANCERY.

Blake, V. C.] [March 23.

THOMPSON v. TORRANCE.

Mental capacity—Testamentary capacity—Will obtained by interrogation—Mortmain Acts.

The testator, a man of education, had become so weakened by illness as to be confined to his bed for weeks prior to his death, and a day or two before that occurred, executed a will by affixing his mark thereto, the instructions for which were obtained by the person preparing it by putting questions to the testator as to the disposition of his different properties; such will when drawn having been read over to the testator clause by clause, who expressed his assent to some of them, while as to others he made intelligent remarks and some changes in the provisions thereof, and then executed it. The Court (BLAKE, V. C.,) in a suit brought to impeach the will as having been obtained by fraudulent practices and undue influence of persons benefited thereunder, as well as by the persons concerned in the preparation of the will, refused the relief sought and dismissed the bill, with costs to be paid out of the residuary estate; although it was shown that though notice had been given to the testator, he was wholly unprepared to make the will when he came to the act—that there was no intention on his part to make a will—that he was a man who, when in possession of his mental faculties, was not likely to take suggestions from others—that not a single devise originated with the deceased—that the author of the will did not know what property the deceased had—that he admitted if he had had this knowledge he would have spoken to him seriously on the subject of his relations—that the will was inofficious—that the testator was 84—that it took two hours to prepare the will, although it covered but one foolscap sheet—that they sent and got the number of the lot from a neighbor, showing that they could not obtain it from the deceased. The residuary estate, consisted of mortgages, the bequest of which, under the Mortmain Act, was declared invalid, and to belong to the next of kin of the testator, the plaintiff in the suit.

Proudfoot, V. C.] [April 2.

WORKMAN v. ROBB.

Fraudulent conveyance—Statute of limitations.

A bill was filed in 1880, alleging that in June, 1864, the defendant L. conveyed to the defendant R. a lot of land, which conveyance was either voluntary or the consideration received therefor had been repaid, and that L. had ever since occupied the lands, without any acknowledgment of title in R. up to January, 1880, when L. attorned to R., placing his (L.'s) son in possession. On the hearing it was satisfactorily established that R. was a mortgagee of the property, and that in 1864 the equity of redemption had been released in consideration of further advances to L., who then left the country and did not return until 1867, when he went into possession and expended large sums of money in improvements made after consultation with R., and which were so made in lieu of rent. The Court, [PROUDFOOT, V. C.,] was of opinion that the suit entirely failed so far as it rested on the fraudulent character of the original transactions between L. and R., and that L. was not compelled to assert a title by length of possession so as to enable an execution sued out at the instance of the plaintiffs to attach upon the property.

Keffer v. *Keffer*, 27 C. P. 257, remarked upon and distinguished.

Blake, V. C.] [April 6.

DIRECT CABLE COMPANY v. DOMINION TELEGRAPH COMPANY.

When a submission to arbitration provides for making such submission a rule of any particular Court, no suit or proceeding can be had in any other Court to set aside the award although such submission has not been made a rule of the Court named in it.

Before an award has been made a rule of Court, a Court of equity has jurisdiction to restrain an arbitrator improperly appointed from entering upon the duties of such arbitration. Where a submission to arbitration has been made a rule of Court, no application can be made to any other Court for the purpose of setting aside the award.

Where the defendants in the suit resided in this country and the plaintiff's principal office was in England, and a contract was entered into there between the parties which was to be

executed in New York, a suit in respect thereof may be instituted in this Province.

In a suit in this Court to set aside the nomination by the defendants of an arbitrator on behalf of the plaintiffs, for irregularity in such nomination—

Held, that the arbitrators being necessary parties, and the defendants resident in this country, the arbitrators though resident out of the jurisdiction, were properly made defendants to the bill.

Blake, V. C.] [April 11.

RE LAYCOCK.

MCGILLIVRAY v. JOHNSON.

Administration Suit.

After an abortive sale by auction, and an abortive sale by tender, the plaintiff who had the conduct of the third sale obtained leave from the Master to bid, and at the solicitation of all parties interested purchased the property at what was shown to be a good price. The guardian of the infants was not aware that the Master had given the plaintiff leave to bid, but did not oppose the motion on a motion to confirm the Master's report.

BLAKE, V. C.:—"One of the most stringent and jealously guarded rules of the court is that a party's *prima facie* interest will not be permitted to conflict with his duty. The vendor's duty is to get as high a price as possible—his interest, if he be allowed to bid, to pay a low one. The jurisdiction in such cases rests exclusively with the court, and the local Masters cannot invade the court's prerogative and expect to have that invasion confirmed by *nunc pro tunc* orders. The plaintiff's solicitor presumably knew the well-established practice of the court, the growth of many years, the subject of many reports, and should have asked the leave of the court before the rule. To encourage this practice would be to establish a most dangerous precedent. I refuse the application."

CHANCERY CHAMBERS.

Blake, V. C.] [Feb. 28.

GODERICH v. BRODIE.

Service of bill of complaint—Assignee in insolvency—Absconding defendant.

Where the defendant in a suit had absconded to the United States before the filing of the bill, and two months after the filing of the bill an assignee in insolvency was appointed by the creditors of the defendant, and the assignee was served with the bill, but not within the time limited by the general orders, the Referee in Chambers made an order allowing the service as good, though made 14 months after the bill was filed.

Held, on appeal, affirming decision of the Referee that the defendant having absconded was a sufficient reason for not proceeding with greater diligence.

DIVISION COURTS.

1st. D. C., Middlesex.] [Feb. 12.

ENGLISH LOAN COMPANY v. HARRIS.

Division Court Act of 1880—Jurisdiction.

The defendant applied by written application for a loan from the plaintiffs. The application was signed at the village of Wiarton, within the limits of 8th Division Court, County of Bruce, where defendant resided. The loan was not effected. The plaintiff brought action in the 1st Division Court of Middlesex to recover costs paid to solicitor for drawing mortgage, investigating title, &c. The head office of the plaintiffs was in the city of London, within the limits of the 1st Division Court of Middlesex. The defendant obtained a summons under sec. 11 of the Division Court Act of 1880, calling on plaintiffs to shew cause why all papers and proceedings should not be transferred to the 8th Division Court of the County of Bruce, and become proceedings thereof as though this cause were at first properly entered therein, on the ground that this Court had no jurisdiction.

ELLIOT Co. J. In this case the written application emanated from the defendant at Wiarton. Upon this application the proceedings were taken. It is, therefore, a portion of the contract and the case seems undistinguishable from *Hagle* v. *Dalrymple*, 8 Pr. R. 183, and so long as that case, also *King* v. *Farrell* 8 Pr. R. 119, and *Noxon* v. *Holmes*, 24 C. P. 541, remain as authorities in our Courts upon the questions involved in this matter, I must adhere to them. The summons must be made absolute.

Summons absolute.

REPORTS.

ONTARIO.

COUNTY COURT OF THE COUNTY OF GREY.

McCLURE v. FARLEY, *et al.*

Division Court transcript—Setting aside execution—Execution not following judgment.

A Division Court transcript set out the proceedings and judgment against two defendants, the issue of execution in the Division Court, return of execution, money made partly of the goods of one defendant and partly of goods of the other, and alleged that one defendant was surety for the other, and that plaintiff had assigned the judgment to the alleged surety. The executions in the County Court were against one defendant only, the alleged principal.

Held, that the transcript and executions were irregular, and should be set aside.

[Owen Sound, January.]

In this case, plaintiff sued the two defendants in the 6th Division Court, Grey, and recovered judgment against both. Execution was issued against both defendants in the Division Court, and the whole amount was made, partly of the goods of Farley, and partly of the goods of Cooke. Cooke, alleging that he was surety for Farley, issued a transcript to the County Court, the transcript stating that he was surety and that he had obtained an assignment of the judgment from plaintiff. The County Court executions were against Farley only.

A summons was obtained to set aside the transcript and executions on the grounds:—

1. That the transcript was not a transcript of the Division Court judgment.

2. That there was no return of "*nulla bona*" to the Division Court executions—that a transcript could not issue from the Division Court after the judgment therein had been satisfied.

3. That the transcript was not in the form required, as it showed that the judgment had been satisfied.

4. That the execution in the County Court did not follow the judgment, the judgment being against defendants jointly, and the executions being against one defendant only.

Frost showed cause, and contended that the execution was authorized by the transcript and the Act R. S. O., cap. 116, secs. 2 and 3. The executions may be amended.

Lane and *Rowe*, in support of the summons, contended that the remedy of the defendant Cooke was by action against Farley, and that the transcript was irregular in form, and cited *Farr* v. *Robins*, 12 C. P. 35; *Jacomb* v. *Henry*, 13 C. P. 377; *Hope* v. *Graves*, 14 C. P. 393; *In re McLean & Jones*, 2 C. L. J. N. S. 206; *Scripture* v. *Gordon*, 7 Prac. R. 164. The execution should follow the judgment: Arch. Prac. 554; *Clarke* v. *Clement*, 6 T. R. 525.

MACPHERSON Co. J., held that the transcript was not in the form authorized by the Division Court Act, sec. 165; and the executions were irregular in form, as they did not follow the judgment, and made an order setting aside the transcript and executions with costs.

(Note by Editors.)

[The whole proceedings were clearly bad. There was nothing upon which to base an execution against lands. The return to the execution in the Court below showed that the judgment was satisfied. The first words of the section (165), "In case an execution is returned *nulla bona* limit the using of the transcript to cases where there is such a return (either as to the whole or in part). Even if the execution had been returned, *as to Farley only*, part made, and *nulla bona*, as to the residue, it would have been improper to issue a transcript, unless it was shown that Cooke also had no goods.

GHENT v. TREMAIN.

Division Court transcript—Omission of proceedings—Setting aside transcript.

A Division Court Transcript to the County Court should set out all the proceedings in the Division Court—under R. S. O. cap. 47, sec. 165.

Quære if it is necessary to set out garnishee proceedings taken after judgment.

[Owen Sound, January.]

A judgment had been obtained in a Division Court, and an execution issued and returned *nulla bona*; an *alias* execution was afterwards issued, and returned *nulla bona*. The plaintiff had also taken certain garnishee pro-

ceedings in the Division Court. At the judgment upon which a small sum had been realized, and sums of money had been paid plaintiff, for which it was contended defendant had not got credit.

The proceedings were removed by transcript to the County Court. This transcript set out the first execution, and the return, but omitted to mention the second execution, and also omitted reference to the garnishee proceedings.

A summons was taken out to set aside the transcript and executions issued from the County Court, on the ground that the transcript did not set out the proceedings in the case, in that the second execution, and the garnishee proceedings were not mentioned; and on the ground that the true amount due was not stated in the transcript.

Lane and *Rowe* showed cause. If the correct amount due is not stated, this is only ground for amending, not for setting the proceedings aside. [MACPHERSON, Co. J., thought that an amendment might be made in this particular if the other objections could be got over.] It is not necessary to set out all the proceedings in the Division Court. Sec. 165 of the Division Court Act, cap. 47, R. S. O., says the transcript is to set out (1) the proceedings in the cause; (2) the date of the execution; (3) the bailiff's return of *nulla bona*. The general words of the first sub-section are cut down by the second and third sub-sections, which only require one execution and the return to be set out. The transcript being regular on its face, and showing that plaintiff was entitled to it, should not be set aside, but the parties should be left to contest it in an action of ejectment if a sale was had. The garnishee proceedings are collateral, not proceedings in the cause.

Creasor and *Morrison*, in support of the summons, contended that all the proceedings in the Division Court must be set out in the transcript—the section 165 requires all the proceedings to be set out: *Farr* v. *Robins*, 12 C. P., 377: *Hope* v. *Graves*, 14 C. P., 393; *Jacomb* v. *Henry*, 14 C. P., 377. The omission of the garnishee proceedings is fatal also. They argued that if the transcript was irregular the Judge had power to set it aside, and that they were not obliged to wait for a sale and then bring an action or defend one.

MACPHERSON, Co., J., held the omission of the second execution fatal to the transcript, and made an order setting aside the transcript and the executions thereunder with costs. Without deciding the point he thought the garnishee proceedings need not be mentioned, as they constituted another cause.

(Note by Editors.)

[We are not prepared to say that we altogether agree with the learned Judge in the view he has taken. One would suppose that a strict compliance with the section in question (sec. 165 of R. S. O., chap. 47) both as to the letter and the spirit was not required. We must examine into the reasons which dictated these requirements. Division Court process never included a writ against lands, such a writ only issuing out of a Court of Record; and it was reasonable that a party to a suit in a Division Court, instituted expressly in order to afford a cheap and easy recovery of small debts, should be required to exhaust all the means and ends for doing so, provided for in that Court. Again, the statute of Geo. III. c. 1, (that in force when the old D. C. Act was passed), partly re-enacted by the C. S. U. C., forbade the issuing of an execution against lands, till after the return of a writ against goods, so that it became necessary to have something for the Clerk of the County Court to go by, before he could issue a fi. fa. lands upon a transcript from a Division Court. That something was the statement in the transcript that a fi. fa. goods had issued in the Court below and had been returned *nulla bona* as to the whole or part.

If, however, in addition to the first execution, an *alias*, a *pluries*, an *alias pluries* etc., had subsequently in proper order been issued, and each successively returned *nulla bona* and each leaving the judgment and the parties to it relatively in the same position, it might be doubted whether there was any necessity for reciting all these writs in the transcript; the omission of them would not prejudice the defendant nor deceive any one, and the insertion of them would not benefit him.

The same holds good as to garnishee proceedings and judgment summons process. If anything had been made in either of these ways, so as to alter the amount of the judgment as originally recovered, it ought, no doubt, to so appear in the transcript, and these proceedings recited therein.]

QUEBEC.

NOTES OF CASES.

(From the *Legal News.*)

UNION BANK v. ONTARIO BANK.

Banking—Forged Draft.

One Deton, on the 17th September, opened a deposit account with the Ontario Bank at Montreal. On the 19th September he obtained from the Union Bank at Quebec a draft for $25 upon the agency of the Union Bank at Montreal. On the 21st September he deposited this draft, fraudulently raised in amount to $5,000, in the Ontario Bank at Montreal. The latter Bank took the precaution of stipulating that the depositor was not to draw cheques against the amount until the draft had been accepted by the Union Bank. The draft went to the Union Bank branch at Montreal in ordinary course, and this branch, having had no advice from its Quebec office, supposed it was all right and paid the money. Deton subsequently obtained from the Ontario Bank $3,500 on a cheque against his deposit, and fled the country before the fraud was discovered, which was not until six days after the draft was issued at Quebec.

The question was which Bank should suffer the loss of the $3,508 fraudulently obtained by Deton. The Union Bank claimed to be repaid the whole excess over the original $25. The Ontario Bank repudiated all liability, but offered to return the $1,500 which remained at the credit of Deton in the Bank.

Mr. Justice JETTE held that the Ontario Bank had taken all the care to guard against fraud that could be expected of it, and that the Union Bank, in neglecting to advise its Montreal branch of the draft, was in fault.

Held, on appeal (Monk J. *dissenting*) that the judgment was right.

RAMSAY, J. said, This case has to be decided by the law of England as it stood on the 30th May, 1849, Art. 2340 C. C. The date is unimportant in the present case. It seems to be unquestionable that according to that law the acceptor of a bill, the signature of which is genuine, but altered as to the amount since it passed from the hands of the drawer, and who had paid the same, could recover back the amount he had overpaid owing to the forgery. The cases of *Smith* v. *Chester*, 1 Durn. & E. 654, and *Jones* v. *Ryde*, 5 Taunt. 487, support this contention In the latter of these cases, Chief Justice Gibbs points out the distinction between the case before him and the case of *Price* v. *Neale*, 3 But. 1354, and the case of *Baillie* v. *Gingell*, 3 Esp. 60. It is quite evident, on general principles, that this must be true. The acceptor or payee got no value for his money, and consequently he had a right to recover back what he had paid, precisely on the same principle that any one who had received a counterfeit shilling from another by mistake could recover back his money. But it is contended that the acceptance differs from payment in this, that the acceptance is a deliberate recognition and a warranty of the whole bill. If this proposition be true, then there is an end to the discussion, but the authorities cited by appellant contradict this pretension. Daniel distinctly says the acceptor guarantees the signature and not the body of the bill. The one he has means of knowing about, the other he has not. The same doctrine is laid down in the case of the *National Bank of Commerce* (in New York) v. *The National Mechanics' Banking Association* 55 N.Y. Rep. 211, cited by respondent. Indeed, it is difficult to understand how any other doctrine could prevail. Starting from this point, appellants contend that they were not bound to know that the draft had been altered, that their acceptance covered only the signature, which was genuine. They say, moreover, that they were led into error by the fact that the draft had been passed by the Ontario Bank, —that if the unknown Deton had presented the draft himself they would have made enquiry, which would have resulted in discovery. In a word, they say that the Ontario Bank had passed upon them a forgery, and that, therefore, the respondents were obliged to return them the money and exercise their recourse against Deton. This position is doubtless very strong, and if it had been supported by authority I should not have felt disposed to alter the rule. Nevertheless, I do not think the argument perfectly sound. As we have already seen, the acceptor is held by his acceptance so far as to recognize that the signature, which he is presumed to know, is genuine. It seems to me that when a Bank is dealing with its own paper it should be presumed to know not only the signature but the whole document. It was the appellants who set the whole thing in movement, and by the signature of their cashier gave currency to a draft which they themselves did not know was forged. They were so secure that they ordered their branch to pay "with or without advice." It seems to me that any other doctrine would lead to inconvenience, and that if this does not hold good for drafts, it would be difficult to say why the rule should obtain with regard to bank notes.

DARLING v. MCINTYRE.

Insolvent Act of 1875—Action under sec. 133—Repealing Act.

An action under s. 133 of the Insolvent Act of 1875 may still be brought, in any case in which the estate of the insolvent became vested in an official assignee before the passing of the act repealing the Insolvent Act.

MASSE *et al.*, v. ROBILLARD.

Clerical influence in elections.

A priest or clergyman may take the side of a candidate in an election, and support it by all lawful means, even from the pulpit. But if a priest does any unlawful act, such as using intimidation by refusing the sacraments to a person who will not vote as he wishes, he will be deemed the agent of the candidate, and the fact that he has committed the unlawful act in the exercise of his priestly office, will not protect the candidate from the consequences of such unlawful act on the part of an agent.

DARLING *et al.* v. BARSALOU *et al.*

Trade mark—Resemblance.

B. & Co. registered a trade mark for the laundry soap made by them, the mark consisting of the imprint of a horse's head, with the words "The Imperial Laundry Bar" stamped on the face of each piece, and the words "J. Barsalou & Co., Montreal," on the opposite side. D. & Co. subsequently manufactured a soap with the imprint of the head of a unicorn and the words "A. Bonin, 115 St. Dominique street, Very Best Laundry" on the face (without any words on the opposite side).

Held, that there was no resemblance or similarity between the marks which could deceive persons of ordinary intelligence, and D. & Co. could not be restrained from continuing the manufacture of thir soap.

EX PARTE ZINC.

Extradition.

A warrant of commitment for extradition should in its terms conform to the requirements of sect. 1, 31 Vict. (Can.) c. 94, in directing the person accused to be committed until surrendered on the requisition of the proper authority or duly discharged according to law. The judge is required to decide whether he deems the evidence adduced before him sufficient to justify the apprehension and commitment for trial of the person accused if the crime had been committed in Canada. If he finds in the affirmative he should so state it in his commitment, and certify the fact to the proper executive authority. His functions do not extend to determining whether the accused should be extradited; that rests with the Governor General after the evidence has been reported to him. If the judge fails to state in the commitment that he deems the evidence sufficient, the commitment will be held defective and insufficient.

Where a person charged with a crime is committed in pursuance of a special authority, the commitment must be special and must exactly pursue that authority. If the commitment does not on its face show that the case of the accused falls within the terms of the extradition treaty and the statutes authorizing the proceedings in extradition, or fails to contain the proper statutory conclusions, no sufficient cause of detention will have been shown, and he will be liberated on *habeas corpus*.

LAW STUDENTS' DEPARTMENT.

EXAMINATION QUESTIONS.

SECOND INTERMEDIATE.

Common Law.

1. Define and illustrate "Estoppel by Matter of Record."

2. Distinguish between a *good* and a *valuable* consideration, and point out cases in which the distinction is material.

3. What is necessary to constitute a valid contract for the sale (*a*) of growing potatoes, and (*b*) of growing grass? Give reasons for your answer.

4. When is a deed requisite to the validity of a contract *at common law*, *i. e.*, apart from statutory enactment?

5. What is the liability, in general terms, of a banker paying a cheque, the amount of which has been altered?

6. What is distress damage feasant?

7. Define trover, detinue, and replevin respectively.

8. What summary method is provided by statute for setting aside fraudulent conveyances at the suit of a judgment creditor?

CERTIFICATE OF FITNESS.

Smith on Contracts—Pleading and Practice.

1. What must appear in a contract required by the Statute of Frauds to be in writing? What exception has been created by a subsequent Statute?

2. What are the matters usually provided for in partnership articles?

3. May a bill of exchange be drawn or accepted payable on a condition? What is the effect of a condition in either case?

4. Under what circumstances will non-presentment of a bill for payment be excused?

CORRESPONDENCE.

To the Editor of The Law Journal:

SIR,—Since the passing of The Indicature Act, I, who expect to appear for call, &c., next February, feel that I am one of those who "blindly grope." How will the change affect the Final Examinations? Will it be necessary to be up in Stephens' Chancery Pleading? Will we be examined in the old practice of the courts, or the new, or both? Will Taylor's Equity continue one of the subjects? In a word, upon what subjects will we be examined?

By answering these questions you will greatly oblige,

Yours, &c.,
G. S. L. S.

April 6th, 1881.

[Our correspondent will see the answer to his question by referring to the advertisement in No. 6 of this Journal. Notice will be given of any change.—ED. *L. J.*]

DEATH OF JUDGE MACDONALD.

AT a meeting of members of the Bar of the County of Wellington the following resolutions were passed:

"That the members of the Bar of the County of Wellington have heard with sorrow of the decease of Archibald Macdonald, Esq., late Judge of the County Court of Wellington, who for the period of twenty-four years efficiently performed the onerous duties of that position; and we desire to record our feelings of deep regret at the great loss not only we but the public have sustained in his death:

That as a mark of our respect for the memory of the late Judge Macdonald, the members of the Bar do attend his funeral in a body, and wear the customary mourning for the period of thirty days:

That we tender to the bereaved family of the late Judge Macdonald our heartfelt condolence in this hour of their affliction and that a copy of the foregoing resolutions be transmitted by the secretary to the family of the late Judge."

Law Society of Upper Canada.

OSGOODE HALL.

HILARY TERM, 44TH VICT.

During this Term the following gentlemen were called to the Bar.

The names are arranged in the order in which they entered the Society, and not in the order of merit.

George A. Skinner, John Philpot Curran, Reginald Boultbee, Harris Buchanan, Goodwin Gibson, William James Thorley Dickson, James Alexander Allan, Walter Alexander Wilkes, James Harley, William White, Daniel Erastus Sheppard, Wallace Nesbitt, James B. McKillop, Colin Campbell, Phillip Henry Drayton, Thomas C. L. Armstrong, John Doherty, Alexander Dawson, Thomas Dickie Cumberland, J. Gordon Jones.

The following gentlemen were admitted into the Society as Students-at-Law.

GRADUATE.

Henry Gordon Mackenzie.

MATRICULANTS OF UNIVERSITIES.

James M. Knowlson, Edwin Mowat Henry, Edward Wilson Boyd, Reginald Rudgerd Boulton, William Arthur Campbell, Arthur Luke Rundle, Frederick Laing Fraser.

JUNIOR CLASS.

James F. Williamson, John Thacker, Edmund Walker Head Van Allen, Robert George Code, William Robert Smyth, William Nassau Irwin, Edward Herbert Ambrose, George Edgar Martin, John Smith Meek, Archibald McKechnie, William Henry Tweedale, Thomas Francis Johnson, Sidney Chilton Mewburn, George Hutchison Esten, William Lawrence Leslie.

The following gentlemen passed their examination as Articled Clerks.

Albert Wesley Benjamin, John Hambly, James Joseph Berry.

RULES

As to Books and Subjects for Examination, as varied in Hilary Term, 1880.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and

Canada Law Journal.

VOL. XVII. MAY 1, 1881. NO. 9.

DIARY FOR MAY.

1. Sun....2nd Sunday after Easter.
3. Tues...Supreme Court sittings, Primary Exam.
4. Wed...Primary Exam.
5. Thurs..Primary Exam.
8. Sun.....3rd Sunday after Easter.
9. Mon...Hon. George Brown died, 1880.
10. Tues...Court of Appeal sitt. begin. Co. Court sitt. or York begin.
11. Wed...Final Examination.
12. Thurs..Final Examination,
13. Fri.....Final Examination,
14. Sat.....Final Examination.
15. Sun.....4th Sunday after Easter.
16. Mon...Easter Term begins.
18. Wed..D. A. Macdonald, Lieut.-Gov. Ontario, 1875.
21. Sat....Confederation of B.N.A. Provinces proclaimed, 1867.
22. Sun....Rogation Sunday. Earl Dufferin Gov.-General, 1872.
24. Tues..Queen's Birthday, 1819.
26. Thurs..Ascension Day.
29. Sun.....1st Sunday after Ascension.
30. Mon...Proudfoot, V. C., appointed, 1874.

TORONTO, MAY 1st, 1881.

RICHARD ALLEYN, Q. C., of the city of Quebec, has been appointed Puisne Judge in the Superior Court of the Province of Quebec, in the room of the Hon. F. J. Baby, who has been appointed Judge of the Court of Queen's Bench.

Mr. E. E. Kay, Q. C., has been appointed to the vacancy in the Chancery Division of the High Court of Justice in England caused by the death of Vice-Chancellor Malins. He was born in 1822, was called to the bar in 1547 and received silk in 1866.

WE understand that Mr. Ewart intends issuing a new edition of his "Manual of Costs" immediately after the new tariff under the Judicature Act is promulgated.

We publish in another place a decision of the United States District Court at Detroit in a maritime case, which will be read with interest. Whether or not the judgment states the law correctly, and it seems to do so, it is a valuable addition to the learning on the subject.

A WRITER in the *Legal News* takes the reporter of the Supreme Court to task for alleged inaccuracies in the early notes of cases furnished by the latter. We would remind the person making the objections that whilst accuracy is of course desirable, it is not expected that more is to be given in these early notes than the general drift of the decision. An exact digest of the judgment is necessary when the case is reported, but it would be unfair to expect an unassailable digest of the whole case in the short hurried note that the reporter is asked to furnish. We have much pleasure in bearing witness to the marked improvement that has taken place in these reports since the first few numbers. We had occasion to comment strongly and not very favorably at first on various matters; but Mr. Cassels and Mr. Duval have evidently determined that they will, as far as possible, prevent the necessity of any unfavorable criticism for the future. We thank them also for their uniform courtesy.

AN evil, to which attention has more than once been drawn in these columns, has been removed by the Judicature Act. It has been the practice of several County Court Clerks, that could be named, to do a class of conveyancing which does not accord with the

"eternal fitness of things." For example, it is not at all desirable, for obvious reasons, that County Clerks should draw or advise upon chattel mortgages, bills of sale, or renewals thereof, or prepare Surrogate Court papers, &c. Section 65 now enacts that "no Clerk or Registrar of the Surrogate Court shall for fee or reward draw or advise upon any will or other testamentary paper, or any paper or document connected with the duties of his office, for which such fee is not expressly allowed to him by the tariff in that behalf; and no Clerk of a County Court shall for fee or reward draw or advise upon any chattel mortgage, or any other paper or document connected with the duties of his office, and for which a fee is not expressly allowed by the tariff in that behalf."

THE JUDICATURE ACT.

The following points are noted from the advanced sheets of the work of Messrs. Taylor & Evart on this Act. We fear that other mistakes and difficulties will be discovered when the statute undergoes the test of practical working; but in a legislation of this kind we must not expect perfection:—

1. In England one of the rules requires that a writ for service out of the jurisdiction shall only be issued upon a judge's order; and it has been held that after a writ has been so issued it is unnecessary to obtain, as formerly, an order for leave to proceed, the matter to be proved upon both applications being obviously the same, viz., that the case was one proper for trial in England. In the Ontario Judicature Act the English rule requiring a judge's order is omitted, and it is provided that after service an order may be obtained allowing the service (O. VII. rules 1, 4.) But the English form of judge's order is left among the forms as No. 110. This order prescribes the time for service, which would be very necessary in England, but not so in Ontario, where the rules themselves make provision (O. VII. 2.)

2. A Divisional Court is one of the Common Law Courts, or the Court of Chancery, with their present quota of three judges, yet in sec. 29 s. s. 3, a Divisional Court shall be constituted by "two or three, *and no more*," of the judges thereof.

3. As under O. IX. r. 3, judgment may be signed in default of appearance upon an acceptance of service and an undertaking to appear. The procedure in rule 6 should make the same provision.

4. O. IX. r. 6. Has a statement of claim to be delivered or not? The rule has it both ways. The difficulty arises from inserting in the rule taken from the English rule after the word "file" in the sixth line the words "and serve," without noticing the confusion it makes.

5. By sec. 62 the Accountant is to have the same judicial and other powers as he now has. There has been no such officer since 26 June, 1876, (see G. O. Chy. 625, 626. See also sec. 68.)

6. Are the Referee in Chambers and Mr. Dalton to continue to discharge their judicial functions, or be superseded by the Master in Chambers? (See sec. 62 and O. XLIX. r. 6).

It would be well to remember that a number of corrections appear in this Act, as it now stands in the statute book just issued; the former issues are therefore not in all respects reliable.

NOTANDA IN APPELLATE PRACTICE.

In general, no appeal can be brought upon a mere matter of form: *Henderson* v. *Malcolm*, 2 Dow. 285. Where a question arose upon the form of the pleadings and the House of Lords was of opinion that the

pleadings would not allow the question to be properly decided,—time was given to arrange for an alteration of the pleadings in *Bristol* v. *Robinson*, 4 H. L. C., 1068. In the case of the *Marchioness of Bute* v. *Mason*, 7 Moo. P. C. Cases 1, Lord Kingsdown said, "there is a question raised as to the frame of the bill. If justice could be done, as the bill is at present framed, we should be anxious to do it, though at the expense of technical rules." Another eminent judge (Knight Bruce, L. J.) in *The Board of Orphans* v. *Kregelius*, 9 Moo. P. C. C. 447, adopts the same language. "It is a wholesome principle of this Court to disregard points of mere form raised upon an appeal, when they do not in any manner affect the substance of the subject in controversy, and have not in any respect a tendency to mislead or prejudice the defendant." So objections of a formal nature as to the reception of evidence, which has not been objected to below, will not be entertained: *Frankland* v. *McGirty*, 1 Knapp 310. When defendant objects to a want of parties to the bill that contention cannot be raised for the first time on appeal: *Mullins* v. *Townsend*, 2 Dow. & L. 430. And Lord Campbell laid down the safe general principle thus: "A safe maxim for Courts of Appeal to be governed by, is that an objection, which if taken, might have been cured, and which has not been taken in the Court below, shall not be taken in the Court of Appeal." *Dhurm Das Pandey* v. *Mussurat Shaman*, 3 Moo. Ind. App. 229, 242.

It is a rule of the Privy Council never to disturb the sentence or decree of the Court below unless they find mistake either of law or fact—either error in principle, or a mistake as to fact in applying a right principle: per Sir J. Patteson, in *The Netherland's Company* v. *Styles*, 9 Moo. P. C. C. 294.

But directions as to costs may be varied in appeal when the appeal is on the merits, and not merely for the sake of costs: *Latour* v. *Queen's Proctor*, 10 H. L. C. 693.

So it is a general rule that no appeal lies on a bare point of practice: *Ferrier* v. *Mowbray*, 7 Wil. Shaw & McL., 158; *Mellish* v. *Richardson*, 1 Cla. & Fin, 235, 236; *Ferrier* v. *Howdon*, 4 Cla. & Fin. 32. Somewhat modifying this, it is held in other cases that a Court of last appeal is not disposed to disturb a decree on a matter of practice which is within the discretion of the Court below, and does not depend on principle: *Ironmonger's Company* v. *Attorney General*, 10 Cla. & Fin. 929; *Wanehope* v. *North British R. Co.*, 4 Macq. 348; *Browne* v. *McClintock*, L. R. 6 H. L. 456. In the last decision in the House of Lords the rule is formulated thus: In matters of practice, when the judges below are unanimous, the Lords never vary their decision, unless perfectly satisfied that it is founded on erroneous principles, and contrary to natural justice: *Cowan* v. *Duke of Buccleugh*, L. R. 2 App. 344.

BULKY SUITS.

In spite of legislative appliances, such as Common Law Procedure and Administration of Justice Acts, designed to simplify and expedite the working of that mill of justice which impatient suitors are prone to think grinds both "slowly" and "exceedingly small," "heavy" and long-drawn-out cases are still not unfrequently met with in this Province. The main cause of this is no doubt the increasing number and complexity of interests incident to the development of a civilized country. Very frequently the public take as much interest in cases such as *McLaren* v. *Caldwell* or *Fisher* v. *Georgian Bay Transportation Co.*, as the profession do, and follow with unabated interest from day to day the voluminous reports of the evidence given by the press. Such cases as these, however sink into utter insignificance when compared with that of *Lloyd* v. *Vickery*, lately tried before the Supreme Court of New

South Wales, which has already lasted for seven years and is not even yet finally disposed of. We subjoin a few particulars as to this great case, taken from the *Queenslander*, in the patriotic hope that their perusal may tend to prevent any Canadian "exodus" to the Antipodes:—

"For seven long years has this great case dragged its slow length along. And even now there is a prospect of another appeal. In some respects the gentlemen who conduct these cases must, we suppose, be familiar with the details. It is questionable whether any one man has read the whole of the vast mass of documentary evidence contributed. The primary judge, Mr. Justice Hargrave, says that *he* has, and the primary judge must be believed. The Chief Justice says he has mastered it as well as he can, though he has not read everything, that nine-tenths of it is wholly irrelevant; and that the mass of matter which he has thus had to master was an opprobrium to the administration of justice. The exhibits and briefs were so voluminous it seems, that they were delivered to counsel in chiffoniers or cabinets under lock and key, all assorted and pigeon-holed in such a way that they could be attacked systematically and with due deliberation. One witness alone was in cross examination before the master in equity for sixty-three days. After all this kind of evidence had been collected before the master in chambers, assisted by clerks and shorthand writers, it had to be argued out and read in Court. The primary judge protested against this infliction; but as it had been taken by his instructions, the learned counsel insisted that he should at least hear it read; and read it was accordingly, the reading alone taking a fortnight of the orthodox Court sittings. No wonder, under these circumstances, that it takes years before a case of this kind can be matured for judgment. And then, when judgment comes, the whole process has probably to be gone over again, in preparation for another appeal to a higher tribunal. No wonder that Chief Justice Martin stands aghast in the presence of the ten reams of exhibits neatly packed in cabinets and duly docketed in convenient pigeon-holes for perusal. All this, in its way, is an exhibition of art, the growth of an artificial system; but it exists not, surely, for any other purpose than the final exhaustion of the litigants. It is a travesty of justice, and simply represents the power of the purse—the *vis inertiæ* of possession which holds on to what it has by all the craft which the subtle usages of the law can devise."

PRESENT STATE OF THE MARRIAGE LAW.

This subject, which has been effectively reviewed by the Imperial Legislature, stands forth as one which pre-eminently points out a need of legislative treatment in this country. Marriage with a deceased wife's sister has been ably and fully discussed in the Dominion Parliament as well as in the secular and religious press of the country, and may receive further elucidation in our columns,—those who are favorable to the law being settled on this one point, (if it be not settled by judicial decision already,) or being changed so as to make it free from doubt, will probably return to its consideration during the next session of Parliament. But we think there are other points on which legislation is needed; and, reading the reports of two cases of bigamy recently brought before one of our western courts, suggests that the whole subject may be fairly brought up for legislative revision.

In the distribution of legislative powers made by the B. N. A. Act (sec. 91, sub-section 26) Marriage and Divorce is assigned to the exclusive legislative authority of the Parliament of Canada. There is no subject upon which there is a greater necessity of uniformity of action and community of sentiment than the one before us. In Ontario the solemnization of marriage is committed exclusively to clergymen and ministers of religion, duly ordained or appointed to administer the rites and ceremonies of the churches or denominations to which they belong; and by virtue of that ordination or appointment, and according to the rites and usages of such churches or denominations, they, and they

only, may solemnize marriage between persons who are not under legal disqualification. Passing over the provisions of law with regard to the necessity for a license, or its equivalent by publication "once openly, in an audible voice, either in the church, chapel, or meeting-house, in which one of the parties has been in the habit of attending worship, or in some church, chapel, meeting-house, or place of public worship with which the minister or clergyman who performs the ceremony is connected, &c.," we think it not without profit to point out the presumptions which flow from this state of the law, and its manifest defects. It cannot be denied that the canon law of England was introduced in this Province by the Constitutional Act—that by the provisions of 33 Geo. III, ch. 4, Presbyterian, Lutheran and Calvinist ministers were allowed to celebrate marriage between certain persons, provided they were not under any legal disqualification; then 11 Geo. 4 ch. 36, confirmed marriages previously celebrated of persons not under canonical disqualification, and authorized ministers of certain denominations to solemnize marriage between persons not under legal disqualification. Subsequently other acts were passed which are found referred to in C. S. U. C. ch. 72 and R. S. O. ch. 124, from an analysis of which it will be seen that ministers of religion of all the various denominations have now the exclusive right, under certain restrictions, to solemnize the ceremony of marriage between persons under no legal disqualification to contract such marriage. In other words, they are officers of the law to whom is committed the duty of such solemnization, and of duly returning the same for public registry.

There is only one exception to the foregoing rule, and that is set forth in the 20th section of the existing statute, which provides that every marriage duly solemnized between members of the religious society called Friends, or Quakers, according to their rites and usages, shall be valid, and all duties ordinarily imposed upon a clergyman are, with regard to such marriages, to be performed by the clerk or secretary of the society or of the meeting at which the marriage is solemnized.

Thus we find that, with the exception just referred to in favor of Quakers, every person desirous of being married to another, whether he or she belongs to a Christian denomination or not—whether or not a Deist, Atheist, or freethinker, must *ex necessitate* submit to the rites of a Christian church, and be married by one of its regularly ordained and recognized ministers, or else not be married at all.

That clergymen and ministers of the denominations, other than the Church of England and the Roman Catholic communion, were in the eye of the law regarded as officers of the law is manifest, because before acting as such they were required to present to the Court of General Sessions of the Peace the proof of their ordination and appointment, and like other public officers on their appointment, on assuming the discharge of their functions of office were obliged to take the oath of allegiance. This, however, was regarded as a stigma, because clergymen of the Churches of England and Rome were not required to pass through such an ordeal, but were permitted to solemnize marriage *ex officio* by virtue of their orders, and therefore the pre-requisites of attending the General Sessions and taking the oath were dispensed with by law.

The loose manner in which marriages are now solemnized by these officers of the law is too notorious to require much comment at our hands. We may, however, refer to the many instances in which ministers have performed the marriage ceremony between mere children, who were obviously too young to be able to give their consent to a legal marriage.

In one of our western counties this most reprehensible practice has been severely censured by the Judge in his charge to the Grand Jury. We will close what we have to

say on this matter in the present number by quoting a portion of his charge, which puts in strong relief the evil complained of, reserving for another occasion our further consideration of this important subject :—

"It has been long contended by the Christian Church, and acceded to by the custom of most civilized countries, that the solemnization of marriage is a religious ordinance, or at all events a ceremony so far connected with the well-being of society that the sanction of a Christian minister should be had to sanctify and bless it. Such is the view of that institution which is enforced by our marriage law—and yet, nothwithstanding, we find so-called Christian ministers so far forgetting themselves and their duty to society as to occasionally stand by to bless and unite in marriage *children* who have eloped from their parents. Not many days ago, a boy of 16 and a girl of 14 years eloped from their parents in Aylmer and went to Springfield and presented themselves to some sort of a minister there, and were married by him. Now this man, whom we are obliged by courtesy to call a Christian minister, in consummating this deed, knew he was committing an improper, immoral and unneighborly act, and one which would not be sanctioned by any well ordered Church or community. Again, a young man elopes with a young girl whom he has conveyed down a ladder from the window of a mother's house, and a minister's willing services are invoked, not because he is their pastor, but because he is a willing tool; he knows, and they all know that the pastor who, under other circumstances, should assuredly have been called upon to perform such a ceremony, would have refused to so outrage the feelings of a widowed mother, as to have solemnized a marriage between a mere child and a confirmed sot and common drunkard; and the minister who did it knew all the facts, but when remonstrated with said, Oh! what did I care? I made $2 by it!"

There is no doubt but that there is only too much ground for these timely and well-merited strictures on a practice which cannot be too strongly condemned, and that a renewed consideration of the whole subject is urgently called for at the hands of those whose duty it is to cure the diseases of the body politic.

SELECTION.

AGENCY IN MANSLAUGHTER.

The case of *Regina* v. *Salmon*, in the Court for the Consideration of Crown Cases Reserved, which received a good deal of public attention at the time the decision was given, will now be better understood from the report of the case which appears in the February number of the *Law Journal* Reports. Unfortunately, the prisoners were not represented by counsel; and therefore the decision, not being strengthened by dealing with arguments advanced against it, is not so satisfactory as it might have been. Considering that this Court is the final Court of Appeal in criminal matters, some relaxation of the rule that accused persons cannot be assisted out of public funds ought to be allowed. The employment of counsel to argue for the defendants would not so much have been for their benefit as for the benefit of the public. The point involved was one which, above all others, requires to be placed in various lights. It was, in the first place, a charge of homicide by culpable negligence, raising in itself probably the most difficult issue known to the criminal law. Secondly, it raised the question of agency or responsibility for the criminal act of another—a head of law which ought most carefully to be kept within due bounds. The result of the decision may be said to be that when several persons are engaged in an unlawful act—unlawful not in the sense of criminal but in the more comprehensive sense—and one of them is guilty of homicide, all may be convicted of manslaughter.

The facts to which the law had to be applied may be very shortly stated. George Salmon, one of the defendants, is a volunteer, and one summer evening, after practice, he took his rifle away with him, contrary to rules, and provided himself with several cartridges. He was joined by his brother John Salmon, and Hancock, the other two prisoners, and

all three having set up a door in a tree, fired at it at a distance of 100 yards. The deceased, a little boy of ten, was in his father's garden, standing on an apple tree so as to water a rose tree. His young sister was near and heard two shots, the second of which killed the boy. There was no trustworthy evidence to show who fired the fatal shot. The son of the owner of the field, who provided the door to fire at, and stood near the defendants, was a witness, and said that four shots were fired, but who fired which shot he could not tell. He thought, too, that the second shot struck the target, which was rather in conflict with the sister's evidence. George Salmon, to screen his brother, said it was he who killed the boy; but, on the other hand, he said it was the second shot which he fired. Hancock said they all three fired one each. There was thus evidence of the death of the boy by one of three defendants, but no proof which of the three it was. There does not seem to have been evidence against John Salmon that he fired a shot at all. The jury, however, found all three prisoners guilty of manslaughter, and the Court for the Consideration of Crown Cases Reserved upheld the conviction.

There seems to be little doubt that the defendants were guilty of an unlawful act. It was proved that all three expressed an intention to fire, and, as shots were fired, to the extent of the unlawfulness of that act they were all three responsible. That the act of firing at a target placed high in a tree, with a rifle carrying a distance of a mile or more, in the neighborhood of houses and gardens, and without any precautions whatever, was culpably negligent, and, therefore, an unlawful act can hardly admit of dispute. If the firing were contrary to the Highway Acts, for example, the conviction of all the defendants would undoubtedly have been proper. But they were indicted for manslaughter, and the mere unlawful act of which they were guilty was not criminal in itself. To make it criminal, there must be added the fact that the death of the boy was caused by it. The mind must not be misled by the consideration that if all three defendants were not convicted, no one on the evidence could be convicted. If it were essential to bring home the death to a particular defendant, the failure of that proof must bring about the failure of the charge. It may not unfairly be argued that the defendants who did not fire the shot which caused the death were no more guilty of manslaughter than the man who lent the field for the purpose of firing. The same consideration is, perhaps, better put by saying that the present decision is capable of a dangerously wide application. If it is not necessary to show that the defendant actually fired the shot producing the death, it is not necessary to show that he fired at all. Possibly the decision goes as far as this, because there seems to have been no evidence that one of the three fired, except that he was among those who did, and shots were heard. We do not think, however, that it was intended to go so far. Lord Coleridge, in giving judgment, said: "The prisoner who fired the fatal shot committed manslaughter; but as the other two joined in the act and fired shots also, they are all guilty of manslaughter." In other words, an active part must be taken in the dangerous act to produce guilt. Suppose, for example, instead of a rifle, a cannon had been used. Clearly those who brought the cannon into position, and who charged and pointed it, would be equally responsible, with the man who actually fired, for the consequences of the shot. The decision, however, is not, in our opinion, satisfactory, as the considerations arising out of the case were barely dealt with. It is difficult to divest the mind from the feeling that the result would have been different if the fatal shot had been clearly brought home to one of the three defendants. In that case, if all three had been charged, would the judges have confirmed the conviction as to all? This is the question which tests the decision. Suppose, for example, two men on bicycles are racing along a road at a furious pace, and one of them kills a passerby. Would both be guilty of manslaughter? On the principle of the present decision, we suppose they would; and yet the bicyclist who did not kill the deceased might have possessed superior skill or a powerful brake, so that if the deceased had crossed his path there would have been no accident. In the same way one or other of the defendants in *Regina* v. *Salmon* might have hit the target every time, so that he could not possibly have done the mischief, and yet he is made responsible for the bad shooting of his companions. We do not say this is not the case, according to the somewhat severe law of responsibility for the acts of companions in force in England; but the reasoning in *Regina* v. *Salmon* has not persuaded us that it is.—*Law Journal.*

NOTES OF RECENT DECISIONS.

LIBEL.

In *Com.* v. *Willard*, Erie Sessions, Pennsylvania, February 28, 1881, it was held that it is no defence to an indictment against one who is the editor and publisher of a newspaper that the libellous article complained of was written and inserted by the local editor of the journal, without the knowledge of the defendant, and in violation of a general order forbidding the publication of any article of a libellous nature without first submitting it to the publisher for his approval. The court said: "Aside from the incalculable damage that may and often does result to the innocent from a misuse of the press in the hands of reckless or malicious persons, and the consequent caution proper to be exacted from those managing newspapers as to the selection of the subordinates in whose hands they intrust this dangerous power, there is the peculiarity incident to the profession of a publisher that the publication of a journal, or a magazine, or a book, is not the visible, manual act of the publisher himself, but is made up of the labors of many different persons, in no one portion of which he may have an actual part. He may not be present at or witness any single one of the various processes of work by which the completed book or newspaper is finally produced; he may not even see it when done and issued to the public, and yet the publication is his act. This is in part, no doubt, the reason why the law of libel forms an apparent exception to the usual rule that one can only be liable criminally for his own individual acts. That such is the law, whatever may be the reason for it, there would seem to be no question. It was established by a long line of cases in England, decided by such judges as Hale, Mansfield, Raymond, Kenyon, Powell, Foster, Ellenborough, and Tenterden, and which will be found fully stated in a note in Starkie on Slander, 1st Am. ed., vol. 2, pp. 30-34. It is found clearly recognized in all the leading text-books on criminal law, and has also been recognized and affirmed by the courts in many of the States of the Union." This is supported by Roscoe Crim. Ev. (6th Am. ed.) 621; Whart. Cr. Law, § 2564; *King* v. *Gutch*, 1 M. & M. 433; *Com.* v. *Morgan*, 107 Mass. 199; *Perrett* v. *N. O. Times*, 25 La. Ann. 170. *Smith* v. *Ashley*, 11 Metc. 367, is overruled by the later Massachusetts cases. The court concluded as follows: "The present case, it will be observed, is not that of a libel surreptitiously smuggled into a newspaper by an employee whose position did not authorize him to prepare or select matter for its columns, as was the fact in *Goodrich* v. *Stone*, 11 Metc. 486, for the article was prepared by the local editor, employed for and entrusted with that branch of the business, and it was done in the usual course of his daily occupation. Nor is it the case of objectionable matter shown to the publisher and by him refused, and afterward printed against orders, nor was it a fraud or imposition practised upon a publisher, by which he was misled. It is not even the case of a publisher absent from the town, and obliged to trust the management to another during his absence. As shown by the testimony of the defendant himself, it was simply the case of an editor and publisher of a newspaper leaving his press and office to the sole control of a subordinate, and with such apparent indifference to the outcome of this confidence that up to the time of his arrest he had not even seen the publication complained of. It may be considered by judicious, thoughtful men, who are in favor of the freedom of the press, but opposed to its license, that this case furnishes in itself an illustration of and an argument for the wisdom of the rule, but be that as it may, it is my duty to enforce the law as it is, and not to theorize as to what it ought to be."—*Albany L.J.*

RIGHTS AS TO BURIAL PLACE.

In *Weld* v. *Walker*, Massachusetts Supreme Court, January, 1881, we find a novel question decided, Chief Justice Gray delivering the opinion. The plaintiff, in a bill in equity, alleged in substance, that two days after the death of his wife he consented to her burial, in a coffin and grave-clothes procured by himself, in a lot in the cemetery of the defendant corporation, owned by the husbands of two sisters of his wife; that he consented to such burial while in great distress of mind, and worn out by taking care of his wife during her last illness, and yielding to continued importunities of the sisters and the husband of one of them,

much against his own wishes and feelings, "fearing that they would make trouble for him if he did not consent," and "which he should not have done had his mind been in condition to realize the situation;" that he has no right or authority to take care of or adorn her grave in that lot, or to bury other of his or her family or friends there, or to be buried himself by her side; that he owns jointly with his co-heirs a lot in the Mount Hope Cemetery, in which his father and mother are buried, and in which he wishes that his late wife, and himself at his death, may be laid; that he desires to remove to this lot her remains, with the coffin containing them, and the stones and monuments placed by him at her grave; and has obtained a permit in due form from the proper board of health for that purpose; that he has requested of the defendants permission to do so in a careful and proper manner, doing no damage to the lot in which she is now deposited, and leaving that lot in good condition; and that they have refused such permission. *Held*, that upon these allegations, if supported by evidence, it was within the authority of the justice before whom the hearing was had, to decide that the plaintiff never freely consented to the burial of his wife in the lot of the defendants' cemetery, with the intention and understanding that it should be her final resting-place; and that a Court of Chancery might order the defendants to permit him to remove her body, coffin, and tombstones to his own lot. The doctrine of ownership of a dead human body was learnedly discussed and adjudged in *Pierce* v. *Proprietors of Swan Point Cemetery*, 10 R. I. 227; S. C., 14 Am. Rep. 667, and it was held that a widow, having consented to the burial of her late husband in a lot purchased by him, could not afterward, against the wishes of his only child, remove the remains to another cemetery.—*Ib.*

On the subject of a widow's right to appoint the burial place of her husband, attention is called to the recent decision by Justice Macomber, of the New York Supreme Court, in *Southworth* v. *Southworth*, which may be read in connection with *Weld* v. *Walker*, *ante*. The plaintiff and her husband were residents of this State, as was the husband's father, the defendant. The husband died February 15, 1880, and his remains were placed in a receiving vault at Geneva in this State, at the suggestion of the defendant. Before his death the plaintiff had expressed a desire to remove his remains, after his death, to Louisville, Kentucky, the residence of her parents, and to bury them there, in her father's lot, to which her father had consented. On the husband's death, the plaintiff removed to Louisville, where she remained till May, 1880, when she returned to this State, where she now resides. About the first of April, 1880, without her knowledge or consent, the defendant caused the remains to be buried in his own lot at Geneva. The plaintiff, wishing to carry out her purpose to inter the remains at Louisville, brought this action to restrain the defendant from interfering with the disinterment of the remains, and the removal of them to Louisville. Justice Macomber upon these facts decides as follows: 1. That presumptively, and in the absence of circumstances and facts overcoming such presumption, and in the absence of a lawful request made by the deceased in his life-time, the plaintiff as wife of the deceased has the right of controlling the place of burial of the deceased. 2. That such right is not absolute, but conditional, and must yield to considerations which make the assertion of such right unreasonable or inequitable. 3. That under the facts established in this case, the plaintiff had not and has not the right to remove the remains to the State of Kentucky, nor to disturb them in their repose. That the plaintiff's complaint be dismissed upon the merits, but not with costs. This is an interesting, and so far as we know, a novel question, and we shall probably hear more of it.—*Albany Law Journal.*

CONTRACT.

It has been held by the Supreme Court of the United States in *Congress and Empire Spring Co.* v. *Knowlton* that where a contract is illegal (being *malum prohibitum* and not *malum in se*) money paid by one party in part performance can be recovered back when the other party has performed no part of the contract and both parties abandoned such contract before it was consummated.

A New York corporation, in violation of the laws of that State, provided for an increase in its capital stock. This increased stock was subscribed for and an assessment paid thereon.

Thereafter the plan for increasing the stock was abandoned by the corporation and an adjustment with subscribers authorized by its trustees. In an action by a subscriber to recover from the corporation the amount of the assessment paid by him, *held*, that it was no defence that the payment was made upon an illegal transaction.—*Central Law Journal.*

CONTEMPT.

Still another curious question of contempt came up in England, before the Court of Appeal, in *Platting Company* v. *Farquharson*, on the 23d of March last. This was the same case in which the Vice-Chancellor had held that it was contempt to advertise in a newspaper for funds to carry on an appeal. The present alleged contempt was an advertisement in a newspaper offering a reward of £100 to any one who could produce documentary evidence that the process to which the patent in question related had been performed before the year 1869. The plaintiffs alleged that the publication of this advertisement was a contempt of court, and applied to the Court of Appeal for an order to commit the publishers. It was urged that the advertisement would tend to induce the forging of documents, and reliance was placed on the case of *Pool* v. *Sacheverel*, 1 P. W. 675, in which Lord Chancellor Macclesfield committed for contempt a person who had inserted in a newspaper an advertisement offering a reward to any person who should discover and legally prove that a marriage, the validity of whch was in question in the suit, was invalid. The Lord Chancellor was of opinion that the advertisement was a direct inducement to subornation of perjury. The Court of Appeal refused the application. Jessel, M. R., said that the advertisement had been inserted by the publishers in the ordinary course of business, and it was clear that they had no intention of interfering with the administration of justice. In order to justify an order for committal, it must be shown that the advertisement, on the face of it, would convey to the mind of a person of ordinary intelligence that it would tend to interfere with the administration of justice. In his lordship's opinion the advertisement was a very harmless one; £100 was not a very large sum, and documentary evidence was not easily forged. The notion that the advertisement would induce the forgery of documents was a wild one, and was not founded on any reasonable construction of it. It was a common practice to offer rewards for the discovery of a lost deed or a lost marriage certificate, and his lordship had never heard it suggested that it was illegal. He did not profess to understand the case *Pool* v. *Sacheverel*, as it was reported, and said that if necessary he should disregard it. He thought it inconsistent with the practice of government in offering rewards for the conviction of offenders.—*Albany Law Journal.*

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH.

VACATION COURT.

Cameron J.] [March 25.

REGINA ex rel. CLANCY v. ST. JEAN.

Alderman—Declaration of qualification—R. S. O. ch. 174, sec. 265—Quo warranto.

The declaration required by the Municipal Act R. S. O. ch. 174, sec. 265, from every person elected under the Act to any office requiring a property qualification, is a pre-requisite to the discharge of the duties of such office.

Where an alderman elect did not state in his declaration the nature of his estate in or the value of the land, but declared that his property was sufficient to qualify him "according to the true intent and meaning of the Municipal Laws of Upper Canada," *Held*, that the declaration was insufficient.

Held, also, that his right to the office on this ground, and for the want of a qualification at the time of his election, might be questioned by a *quo warranto* at the instance of a ratepayer not a voter of or resident in the ward, and who therefore could not be a relator under the Municipal Act. *Regina ex rel. White* v. *Roach*, 18 U. C. R. 226, and *Kelly* v. *Macarow*, 14 C. C. 457, distinguished.

Held, also, that the relator was not too late, having applied in the next term after the election, and only one day after the time for moving under the statute.

Mosgrove, for relator.

J. W. W. Ward, contra.

IN RE CLANCY V. CONWAY.

Municipal Councillor—Qualification.

A person, who, having himself no license, but in connection with a license to his son, sells liquors by retail, is not disqualified under sec. 74 of the Municipal Act, from holding the office of Alderman, though he may have rendered himself liable to penalties for breach of the Liquor License Act.

The declaration of qualification not having been made, leave was given to defendant to make the same within ten days, otherwise, following *Reg. ex rel. Clancy* v. *St. Jean*, ante. leave was granted to file an information.

Mosgrove, for relator.

J. W. W. Ward, for defendant.

CHANCERY.

Full court.] [April 19.

NEILL V. CARROLL.

Mechanics' Lien Act—Computation of time.

Upon re-hearing, the judgment of Spragge C., reported in 28 Gr. 30 was affirmed with costs.

JELLETT V. ANDERSON.

Ferry, disturbance of—License of right to ferry—C. S. U. C., cap. 43, sec. 10.

Upon re-hearing, the judgment of Spragge C., reported in 27 Gr. 411, was affirmed with costs.

Blake, V. C.] [April 14.

MCDONALD V. FORBES.

Presumption of death and intestacy—Evidence—Partition.

Where there was evidence of a negative nature, which, though not conclusive, was sufficient to warrant the presumption of the death of certain parties, and also that they had died intestate, the Court, in the absence of positive proof, refused to presume that they had died unmarried or without issue.

While granting partition and sale of lands in which such persons, if alive, would be entitled to share, the Court [BLAKE, V. C.] directed inquiries to be made in the neighborhood where they had last been heard of, and advertisements to be issued, their shares to remain intact in the meantime, till evidence could be produced on this point.

REPORTS.

ONTARIO.

FIRST DIVISION COURT, RENFREW.

(Reported for the LAW JOURNAL by M. J. Gorman, Esq. Barrister-at-law.)

FINDLAY V. SAYERS.—MCINTYRE, Garnishee.

Attachment of debts—Insolvent Act—Privileged claim.

The primary debtor, Sayers, made an assignment, under the Insolvent Act of 1869, on the 2nd March, 1875. He had previously become indebted to the primary creditor, Findlay, in $9.25, on an open account. The insolvent, by an oversight, omitted to enter the name of the primary creditor in his schedule of creditors, annexed to the deed of assignment, or to include this claim in his statement of liabilities. Thomas Deacon, on the 23rd March, 1875, became Assignee of the estate. No dividend had yet been declared, nor had the insolvent obtained the execution of any deed of composition, or any consent to discharge, nor been discharged by the Court, and the estate still remained in the hands of the assignee.

In March, 1879, the primary creditor obtained a judgment against the insolvent for $9.25 debt, and $2.78 costs.—The primary creditor did not come in and prove his claim in the insolvent Court, or seek to be put on the list of creditors.

In 1880, the insolvent became entitled to a sum of $13.10, from the garnishee, McIntyre—which amount was due to him for his *personal*

labor for the garnishee, and performed since the date of his assignment, but not protected by 37 Vict. ch. 13, inasmuch as the claim of the primary creditor accrued prior to 1st Oct., 1874—and the amount was not more than adequate for the support of himself and family.

In September, 1880, the primary creditor issued the garnishee summons in this cause, and when the case came up for trial on the 2nd November, 1880, the assignee intervened and claimed the amount so earned by the insolvent, and on the same day the insolvent filed a supplementary list of creditors, in which he placed the name of the primary creditor for the amount of the account due in 1874—thus placing the primary creditor in the same position in regard to him and his estate as if his name had been inserted in the first list of creditors.

The assignee contended that under the Insolvent Acts of 1869 and 1875, and amendments, he was entitled to the amount due by McIntyre, as part of the insolvent's estate, and liable to distribution for all his creditors.

Burritt, for the primary creditor, contended that the assignee was not entitled to the amount coming from the garnishee, on the ground that the amount, being for the *personal labor* of the insolvent, did not pass to the assignee ; and that as the assignee could not claim it, the primary creditor who had resorted to this garnishee proceeding and having intercepted the money in the garnishee's hands, had the only right to it, and could apply it to the satisfaction of his claim—notwithstanding the palpable preference this would give him over other creditors.

DEACON, Co. J. The question is now whether the assignee of the insolvent's estate, representing all the creditors, or this one creditor, Mr. Findlay (who has stepped out of the ranks, and is proceeding on his own behalf, irrespective of the provisions of the Insolvent Act), or either of them, is entitled to the money earned by this insolvent by his personal labor.

I am of opinion that neither of them is so entitled.

That the Assignee is not entitled to claim the money I think is quite clear from an examination of the cases of *Chippendall* v. *Tomlinson*, 4 Doug., 318; *Williams* v. *Chambers*, 10 Q. B. 337; *White* v. *Elliott et al.*, 30 U. C. R., 253; *Wadling* v. *Oliphant*, 1. Q. B. D. 145.

It is not alleged or pretended that the insolvent has accumulated the amount indicated by Lord Alvanley, C.J., as in 4 Doug. * * *

Then as to the right of this primary creditor, who is now on the same footing, in all respects, as the rest of the insolvent's unsecured creditors, there is nothing in any of the cases that would support the contention that one creditor (without any exceptional right), by adopting proceedings outside of the Insolvent Act, could obtain from either the insolvent himself or from his estate (and for the personal advantage and benefit of such creditor alone) what the assignee of the insolvent's estate, who represents all the creditors, and who is bound to treat all alike, without the slightest approach to preference or priority, could not be allowed to do. If, as against such assignee, the *personal earnings* of the Insolvent are exempted, for the necessary and humane purpose of allowing him to live at all, surely the same *ratio decidendi* will apply, with at least equal force, to such a proceeding as the present on the part of one of the creditors, contrary, as I take it, to the whole tenor and policy of the Insolvent Acts—see sections 16, 39 and 83, also *Patterson* v. *McCarthy*, 35 U. C. R. 14; *Blakeley* v. *Hall*, 21 C. P. 138; *Re Fair* and *Bell*, 2 Ap. Rep. 632. The general purpose and policy of the Act is to produce *equality* in distribution among the creditors (holding claims and having rights only of a common and equal character and nature), and when an assignment is made, the whole estate and effects of the Insolvent should be wholly administered by the Court in the Insolvency proceedings. See *Re Fair* and *Bell*, *ante* 636.

The result of my examination of authorities is that what the Assignee, who is trustee for and represents all the creditors alike, cannot be permitted to do, no one of such creditors (not holding any exceptional right, position or lien) stepping out of the ranks and adopting a by-proceeding, can be allowed to accomplish on his own behalf and for his own individual benefit. I have not been disappointed in being unable to find any authority which would uphold his doing so. What the Assignee, acting on behalf of all the creditors, may be able to accomplish in case this Insolvent acccumulates any considerable sum of money, or any amount beyond what may be sufficient for the necessary

support of himself and his family, or lays out such surplus on lands or goods, I am not at present called upon to determine. The Courts say that in the meantime "*he* (and it would appear his family, also) *must live*," and as a necessary consequence his personal earnings (not rising to the magnitude before suggested) must be held to be exempt—as against the assignee of his estate, and, as I take it, for the same reason and on the same ground, equally so as against all and every of those for whom such Assignee is the Trustee and representative. The 68th Section of the Insolvent Act would not assist the present plaintiff, as no creditor could be allowed to do anything *in the name of the assignee*, which the assignee himself, on his own motion, could not be permitted to do. The result of the whole is that there is no fund in the hands of the garnishee which this primary creditor is entitled to recover or obtain, and the cause must be dismissed, the primary creditor paying the costs taxable to Clerk and Bailiff; no other costs to be taxed as against him.

UNITED STATES.

MARITIME CASES.

IN RE "TRENTON."

Sale of American vessel by Maritime Court of Ontario—Effect of extinguishment of liens.

[Detroit, Nov. 29th, 1880.

This was a libel for supplies and materials furnished at Cleveland, the home port of the vessel, in 1876, for which a lien was claimed under the law of the state of Ohio. The present owner of the schooner appearing as claimant pleaded in substance that in July, 1878, the libellants caused the vessel to be seized at Toronto, Ont., by virtue of a warrant issued by the Maritime Court of Ontario, upon a petition filed by the libellants for the same cause of action upon which their libel was filed in this Court; that in August, 1878, one Michael Gallagher intervened with a claim for wages as watchman and ship-keeper from December 1, 1877, to June [illegible] 1878; that about the same time one William McAllister also intervened with a claim for wages as mate from April 4 to May 4, 1877, to the amount of $52.50; that the two last mentioned claims were consolidated, and on September 25, 1878, the vessel was condemned and ordered sold to satisfy these claims; that upon such sale she was purchased by the claimant for $1,000, and she has since been registered at the custom-house in Toronto; that notice of the pendency of these proceedings, and of the sale, was given by publication, pursuant to the practice of the Court, and by the arrest and detention of the vessel; that the Maritime Court of Ontario had jurisdiction of these causes and authority to direct the sale, and that claimant became the owner of the vessel, discharged of all liens.

It appeared from the proceedings in the Canadian case that a demurrer was interposed to libellant's petition upon the ground that the Maritime Court had no jurisdiction to enforce the claim for necessaries supplied to an American vessel in a port in the United States.

This demurrer was sustained by the Court, and libellant's petition dismissed. The vessel was sold, as above stated, by virtue of a decree rendered upon the consolidated claims of Gallagher and McAllister.

The question in this case was whether this sale was sufficient to divest the libellants of their claim for necessaries.

Moore and *Canfield*, for libellants.

Wisner and *Speed*, for the claimant.

BROWN, J. The Maritime Court of Ontario was created by an Act of Parliament of the Dominion of Canada, approved April 28, 1877, the object of which was to "establish a court of maritime jurisdiction in the Province of Ontario." The first section vested in the Court, in very brief language, "Such jurisdiction as is exercised by any existing British vice-admiralty Court." To ascertain what jurisdiction is exercised by the vice-admiralty Courts of Great Britain, we are referred to an Act of the Imperial Parliament known as "The Vice Admiralty Court's Act, 1863," which is made applicable to all existing as well as to future Vice-Admiralty Courts. The 10th section of this Act declares that these Courts shall have cognizance of what are generally known as maritime cases, viz.: Seamen's and master's wages, pilotage, salvage, towage, damage, bottomry bonds, payments of mortgages from the proceeds of sale, possessory suits, and amongst others (subdivision 10), "claims for necessaries supplied in

the possession in which the Court is established, to any ship of which no owner or part owner is domiciled within the possession at the time of the necessaries being supplied."

In considering the effect of this sale I must assume that the Dominion Parliament had the requisite authority to establish this Court, and that it possessed the powers and jurisdiction which the Act purports to vest in it. While not strictly a vice-admiralty Court (the judges of which hold their commission directly from the Crown), its jurisdiction is nearly if not quite identical with that of those Courts, and we are bound to give its proceedings such faith and credit as is given to them.

That the sale of a vessel, made pursuant to the decree of a foreign Court of admiralty, will be held valid in every other country, and will vest a clear and indefeasible title in the purchaser, is entirely settled, both in England and America. (Story on the Conflict of Laws, sec. 592; *Williams* v. *Armroyd*, 7 Cr. 423; *The Tremont*, 1 W. Rob. 163; *The Mary*, 9 Cr. 126; *The Amelie*, Wall. 18; *The Granite State*, 1 Sprague, 277; in the case of the *Helena*, 4 Rob. Admr. 3, this doctrine was carried so far as to sustain a sale made after a capture by pirates. See also *Grant* v. *MacLachlin*, 4 Johns, 34.)

These cases fully establish the doctrine stated by Mr. Justice Story (Conflict of Laws, sec. 592) that "whatever the Court settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer or other act, will be held valid in every other country where the same question comes directly or indirectly in judgment before any other foreign tribunal. This is very familiarly known in the cases of proceedings *in rem* in foreign Courts of admiralty. Whether they are causes of prize or of bottomry, or of salvage, or of forfeiture, or of any of the like nature over which courts have a rightful jurisdiction, founded upon the actual, rightful or constructive possession of the subject matter."

This is not the law of England and America alone. The commercial code of France contains similar provisions regarding the judicial sale of ships.

Article, 193. "The liens of creditors shall be extinguished independently of the general methods of extinguishing obligations, by a judicial sale made according to the forms established by the following title, or when, after a voluntary sale, the ship shall have made a voyage at sea under the name and at the risk of the purchaser, and without opposition on the part of the creditors of the vendor."

In commenting upon this article, Dufour observes (Droit Maritime, Vol. 2, p. 47), "Moreover, the sale upon seizure has always had the effect, in our law, of purging the incumbrances with which the property was charged." "The decree clears all liens," said Loysel. We perceive the reason of this. These kinds of sales are made notoriously and publicly. The creditors are perfectly advised of what is passing. It is for them to take precautions to assure their payment from the price of the ship; but if they persist in remaining unknown their negligence ought not to prejudice the purchaser. To these general reasons we ought to add another peculiar to the maritime law. He who buys at a judicial sale must pay his price upon the spot. He is not bound to wait until the creditors are made known to pay into their hands. He ought, then, to be protected against their claims. Otherwise the judicial sale, instead of offering security which attracts buyers, would be only a snare from which they would eagerly escape. For these reasons, according to our article, the purchaser at a judicial sale receives the vessel clear of all incumbrances"—(p. 53) "Moreover it would not follow that the creditors are entirely disarmed by this result. On the one hand their debt, in effect, subsists; and, on the other, nothing is easier than to transfer the entire amount, with the lien which it draws after it, to the price of the ship."

Article 76 of the German mercantile code expressly provides that the lien of a ship's creditors upon the vessel becomes void:

1. "By a compulsory sale of the vessel in a home port the purchase money takes the place of the ship as regards the ship's creditors. The ship's creditors must be publicly summoned to protect their rights. In other respects the provisions regulating the proceeedings for a sale are reserved to the laws of the various countries." The 600th article of the Spanish code is equally explicit. "If the sale takes place at public auction and with the intervention of judicial authority, according to the formulas prescribed by article 608, every responsibility of the ship in favor of its creditor is extinguished from the moment in which the

written evidence of sale is agreed to." Similar provisions are found in article 1398 of the Portuguese, article 193 of the Belgian, article2 90 of the Italian, article 840 of the Chilian, and article 477 of the Brazilian code. In short the doctrine that the sale of a vessel by a court of competent jurisdiction discharges her from liens of every description, is the law of the civilized world.

Such sales, however, may be impeached by the owner or other person interested, by showing:

1. That the court or officer making the sale had no jurisdiction of the subject matter by actual seizure and custody of the thing sold: *Rose* v. *Himely*, 4 Cranch. 241. *Bradstreet* v. *The Neptune Ins. Co.*, 3 Sumn. 601. *The Mary*, 9 Cranch. 126. *Woodruff* v. *Taylor*, 20 Vt. 65. *Daily* v. *Doe*, 3 Federal Rep. 903. Whether it be not also essential that there should have been proper judicial proceedings upon which to found the decree, and personal or public notice of the pendency of such proceedings, it is unnecessary here to determine, since it appears that sworn petitions were filed and notice of the pendency of the proceedings given through the newspapers, pursuant to the practice of the maritime court.

2. That the sale was made by a fraudulent collusion, to which the purchaser at such sale was a party: *Parkhurst* v. *Sumner*, 23 Vt. 536. *Annett* v. *Terry*, 35 N. Y. 256. *Castrique* v. *Imrie*, L. R. 4 H. L. C. 427.

3. That the sale was contrary to natural justice: *The Flayoden*, 1 Rob. 135; *Castrique* v. *Imrie*. In case of the sale by a master the court will enquire into the circumstances and see whether it was necessary for the interest of all concerned; but the effect of such sale to discharge the liens is the same: *The Amelie*, 6 Wall. 18.

In the case under consideration none of these objections are taken to the validity of this sale, but it is insisted that it cannot be held to have discharged the vessel of liens which the court making the sale had no jurisdiction to enforce. I have found no case, except possibly that of the *Angelique* (17 Law Rep. 104, since expressly over-ruled), which lends countenance to this proposition. Upon principle it seems to me wholly untenable. It is true the vessel was originally condemned, in part at least, upon a claim for ship-keepers' fees, which would not in this country be considered to import a maritime lien: *The Thomas Scattergood*, Gilpin 1; *The Havana*, 1 Sprague 402; *The Island City*, 1 Low 375; *The Sarah Jane*, 2 Am. Law Rev. 450; *Gurney* v. *Crockett*, Abb. Ad. 493). But this was a question exclusively for the consideration of the maritime court under the laws of Canada, and the presumption is conclusive that the facts necessary to give that court jurisdiction existed: *Hudson* v. *Guestier*, 6 Cr. 281; *Comstock* v. *Crawford*, 3 Wall 396: To say that the judicial sale of a vessel frees her only from such liens as the court making the sale had jurisdiction to enforce by original process is a practical denial of the principle that such a sale vests a clear title in the purchaser. This would make the validity of the sale depend, not upon the power of the court to condemn and sell, but upon its authority to assume jurisdiction of all claims, which by the law of another country, might be liens upon her. There are probably no two countries in which the jurisdiction of the admiralty courts is identically the same. That of our own courts does not extend to all cases which would fall within such jurisdiction according to the civil law and the practices and usages of continental Europe. By the codes of most civilized nations the cost of construction, the wages of shipkeepers, the rent of warehouses for the storage of her tackle and apparel, money lent to the captain for the use of the vessel are all ranked among the privileged debts. In England the court of admiralty is vested with jurisdiction not only of ordinary collisions, but of damages done by a ship to wharves, break-waters and other fixtures annexed to the soil; while in this country it is limited to floating structures. In England a master has a remedy against the ship and freight for wages. In the United States he is confined to a proceeding *in personam*. By the law of continental Europe a lien arises for necessaries furnished in a home port, while in this country there is none unless created by a state statute, and none in England if an owner is domiciled within the kingdom. We also recognize liens for general average, wharfage, stevedores' wages and premiums of insurance, none of which are within the jurisdiction of the Admiralty Division of the High Court of Justice. We also admit claims for damage to cargoes, while the English court can only proceed against the vessel where

the cargo is brought into England or Wales and no owner is domiciled therein. It may be added that the English Admiralty has jurisdiction of accounts between part owners, and may decree the sale of a share or shares in the ship, while we can only take cognizance of such disputes incidentally to the distribution of the proceeds.

Now, if the theory of the libellant be correct, a judicial sale of a vessel in one country would free her from none of the liens which the courts of that country were enabled to enforce. A sale under such circumstances would be utterly destructive of the interests of owners and a complete sacrifice of the vessel. No one could possibly know the value of his purchase, for no one could foresee the amount of claims that might be made against the vessel in other countries. It would also compel us to inquire in each case whether such foreign court could have taken cognizance of the claim, either by original proceeding or by petition against the proceeds of sale, and, as the foreign law in each case must be proved as a question of fact, the errors and confusion into which we should fall will be readily appreciated.

The truth is, that all these liens are inchoate rights, subject to the contingency of loss in case of disaster to the vessel necessitating a sale by the master, or in case judicial proceedings are taken against her in a foreign country to subject her to claims recognized by the law of such country. The recognition of liens and the order in which they shall be marshalled and paid, pertain to the remedy, and are administered according to the *lex fori*, when the courts of such country have obtained jurisdiction of the *res* by actual seizure, they have full power to dispose of the property and to transfer the title, and such transfer will ordinarily be respected in every other country. Nor is this power limited to the final determination of the case. The title to property sold *pendente lite* will be respected in another country, though the proceedings upon which the property was originally seized, fail : *Stringer* v. *Marine Insurance Company*, L. R., 4 Q. B., 676.

In these cases of judicial sales *in rem*, the liens of creditors are not extinguished, but are merely transferred from the *res* itself to the fund in court. The decree of the maritime court deprived the libellant in this case of no right of property. It was merely adjudged that his claim was not of that character which entitled him to set the machinery of the court in motion. It does not follow that the court would not have entertained a petition by the libellant for payment from the proceeds of sale, after the satisfaction of what under the laws of Canada are maritime liens, upon proof that by the *lex loci contractus* he was entitled to a lien. It is a constant practice in our courts of admiralty to decree the payment of surplus proceeds to mortgagees and others having liens which are not enforcible by original proceedings. As Mr. Justice Story observes (Conflict of Laws, sec. 322, b) "where the lien or privilege is created by the *lex loci contractus*, it will generally, though not universally, be respected and enforced in all places where the property is found or where the right can be beneficially enforced by the *lex fori*. And on the other hand, where the lien or privilege does not exist in the place of the contract, it will not be allowed in another country, although the local law where the suit is brought would otherwise sustain it." Sec. 323—"But the recognition of the existence and validity of such liens by foreign countries, is not to be confounded with the giving them a superiority or priority over all other liens and rights justly acquired in such foreign countries under their own laws, merely because the former liens in the country where they first attached, had there by law, or by custom, such a superiority or priority." In *Harrison* v. *Sterry*, 5 Cranch, 289, Chief Justice Marshall used the following language: "The law of the place where the contract is made is, generally speaking, the law of the contract; that is, it is the law by which the contract is expounded. It is extrinsic, and rather a personal privilege, dependent upon the place where the property lies, and where the court sits, which is to decide the cause."

It is believed to be the rule of the English as well as American courts of Admiralty, after the payment of maritime liens to direct the surplus proceeds to be paid over to any one who may have a lien upon such proceeds by the law of the place where the contract, from which the lien arose, is made ; or at least to retain the fund in court until the court of chancery shall have made an order for its distribution : *The Flora*, 1 Hagg, 298. *The Harmonia*, 1 St. Rob. 178. *The Nordstjeruen*, Swab. 260. *The Gustaf*, 6 L. T. (U. S.) 660. But even if the foreign

court should misjudge this question, and hold that by the law of Ohio the libellant had no lien at all upon the vessel, or thould deny his petition for payment from the remnants in court, the sale would not thereby be invalidated, or the vessel remain subject to arrest in this country. This was the precise question decided in *Castrique* v. *Imrie*, L. R. 4 H. L. C. 427. That was an action of trover by the assignee of a mortgagee for the conversion of the ship Ann Martin. Defendant claimed title as purchaser at a judicial sale in France. The question arose whether the proceedings in the civil tribunal were *in personam* or *in rem*. It was held that the sale ordered was not of the interest of the owner in the ship, as upon execution, but of the ship itself; and that such sale divested the title of the plaintiff, although he had set up his mortgage in tne French court, and that court had disallowed it, under a misapprehension of his rights under the English law. In delivering the opinion of the courtof Exchequer Chamber, on appeal from the Common Pleas, Mr. Justice Blackburn remarked: "We think the inquiry is, first, whether the subject matter was so situated as to be within the lawful control of the state under authority of which the court exists; and, secondly, whether the sovereign authority of that state has conferred on the court power to decide as to the disposition of the thing, and the court has acted within its jurisdiction." The judgment of the Exchequer Chamber was affirmed by the House of Lords, their lordships holding that the error of the French court in construing the law of England did not render its judgment void in a foreign country, although it would have been otherwise in a case of fraud, and that they were bound to give it effect, at least so far as to sustain the validity of the sale.

The fact that the vessel in this case was sold for the small sum of $1,000 is due to a multiplicity of causes, amongst others to the uncertainty of the law, but in the absence of fraud it cannot be considered an element in the decision of the case. I am clearly of the opinion that the sale was valid and vested a complete title to the property in the purchaser. The libel must be dismissed.

As the cases of the *Kate Moffatt* and *Gladiator* differ from this only in the fact that libellants' claims were rejected upon the ground that the Maritime Court had no authority to enforce liens which accrued before the passage of the Act creating the court, a like disposition will be made of them.

LAW STUDENTS' DEPARTMENT.

EXAMINATION QUESTIONS.

(Continued.)

5. Define and distinguish *bottomry* and *respondentia*.

6. Under what circumstances can a corporation be bound by a contract not under seal?

7. What is implied in the sale of the goodwill of a business? What are the rights of the vendor and purchaser respectively?

8. To what extent is a person intrusted with the possession of goods to be deemed by statute to be the owner thereof?

9. What are the rules as to the appropriation of money paid by a debtor to his creditor, where there are several debts?

10. In what cases will the breach of a warranty, given upon a sale of chattels, enable the purchaser to rescind the contract? Apply the law to the sale of a machine with a warranty that it would do certain work in a certain time.

CERTIFICATE OF FITNESS.

Leith's Blackstone—Real Property Statutes.

1. Show clearly the necessity for possession being taken on a conveyance by lease and release, and what kind of possession suffices.

2. Distinguish between corporeal and incorporeal hereditaments as to the mode of their conveyance in former times, and show the termination of the distinction.

3. Give the operative words of a conveyance by which a tenant in tail conveys an estate in fee simple, and that part of the conveyance relating to the protector of the settlement.

4. The wife of a vendor does not join him in the conveyance. At what period will her right to bring an action for dower cease?

5. The purchaser of land dies intestate, leaving a mother and two brothers him surviving. To whom will the land descend under the three periods?

6. What was the decision in Taltarum's case?

7. What is meant by the statute which enacts that no descent cast, discontinuance, or warranty shall toll or defeat any right of entry or action for the recovery of land? Explain the terms used.

8. Within what time must a will be registered? What is the effect on non-registration?

9. Under what circumstances, and to what extent are recitals in deeds, evidence of the facts recited?

10. What are the provisions of our Real Property Limitation Act as to the periods within which actions in respect of easements, must be brought?

EXAMINATION FOR CALL.

Mercantile law—Contracts—Pleading and practice.

1. A Bill of Exchange drawn by A on and accepted by B, payable at the Canadian Bank of Commerce in Toronto, held by that bank, is dishonored. Give a short sketch of all proper and necessary proceedings to be taken on behalf of the bank from dishonor to final judgment against the maker and endorser, mentioning the purport of all statutory enactments relating to such proceedings.

2. A debtor, instead of paying his creditor, directs him to take a bill of a third person, which the creditor does. What effect has this on the original debt? Answer fully.

3. State the five rules given by Byles in regard to the effect given to foreign laws relating to bills of exchange and promissory notes, by English Courts.

4. A partnership firm, consisting of A and B, who owe a debt to C, subsequently take in a new partner D, and accept a bill for the old debt in the name of the new firm. C is cognizant of all the facts. What effect will this have on the acceptance in the hands of C?

5. A chose in action is not assignable. How is this statement varied by Ontario statute? Prior to that statute, in how far were *covenants running with the land* an exception to the rule? Explain fully.

6. State fully the rule in regard to the admissibility of parol evidence of usage, for the purpose of qualifying the sense of a written contract.

7. An agent enters into a contract in his own name. What are the rights of his principal? Answer fully.

8. What exceptions to the rule, that a man cannot give a better title to goods than he has himself, have been created by the Factors' Act?

9. Distinguish between legal and equitable set-off, showing generally the cases in which set-off can effectually be pleaded, with reason for your statements.

10. Define the term *duplicity in pleading*. How is such a fault to be met, and why?

EXAMINATION FOR CALL.

Darl's vendors and purchasers—Walkem on wills—Statutes.

1. Is the liablity of a purchaser from a trustee to see to the application of the purchase money to be determined by reference to the deed creating the trust, or the circumstances existing at the time of the sale? Illustrate your answer.

2. A testator by his will, directed his debts to be paid. Was there formerly, and is there now, any power in any of his representatives to sell the real estate for the purpose of paying the debts? Explain and give authority for your answer.

3. Into what three classes may covenants given by a vendee of lands be divided? What is meant by such covenants running with the land? Do all such covenants always run with the land? Explain fully.

4. Discuss the question whether, in an action upon covenants in a conveyance of land, the value of improvements placed upon the land by the grantee can be recovered as damages.

5. Under what circumstances will the Court of Chancery decree specific performance of a contract for the erection of buildings?

6. Whiteacre and Blackacre are held by A, subject to a mortgage, who conveys the former to B and the latter to C. What are the rights of B and C with reference to the mortgage?

7. What facts have to be proved by the plaintiff in a suit to set aside a voluntary conveyance as fraudulent against creditors? Answer fully.

8. What statutory power has a settlor to appoint a protector to the settlement, irrespective of estates in the lands?

9. Under what, if any, circumstances can an executor complete an agreement made by the testator for the sale of lands?

10. What is the law as to alterations or interlineations in a will being taken as part of the will?

FLOTSAM AND JETSAM.

A PASSENGER on a railway in a western State accused one of the Company's servants of stealing his watch. The accused thereupon struck and severely injured him. On further search it appeared that the watch had been in the passenger's pocket all the time, unknown to him. He brought an action against the company for injuries sustained. The jury found for the plaintiff and the Court held that the contract of the company was to safely carry the passenger and to treat him with civility and propriety, and that all of the servants of the company employed upon the train were but representing the defendant company in performing the contract, and that the brakeman was in the line of his duty when on the train and assisting the defendant in performing the contract to safely carry and to civilly treat the passenger, and for the breach of the contract the company was liable.—*Chicago Legal News.*

BRITISH COLUMBIA.—We are indebted to the courtesy of Mr. Justice Crease for a copy of the "Weekly Notes," issued "by authority," in his Province, received too late, however, for notice in this number.

Law Society of Upper Canada.

OSGOODE HALL.

HILARY TERM, 44TH VICT.

During this Term the following gentlemen were called to the Bar.

The names are arranged in the order in which they entered the Society, and not in the order of merit.

George A. Skinner, John Philpot Curran, Reginald Boultbee, Harris Buchanan, Goodwin Gibson, William James Thorley Dickson, James Alexander Allan, Walter Alexander Wilkes, James Harley, William White, Daniel Erastus Sheppard, Wallace Nesbitt, James B. McKillop, Colin Campbell, Phillip Henry Drayton, Thomas C. L. Armstrong, John Doherty, Alexander Dawson, Thomas Dickie Cumberland, J. Gordon Jones.

The following gentlemen were admitted into the Society as Students-at-Law.

GRADUATE.

Henry Gordon Mackenzie.

MATRICULANTS OF UNIVERSITIES.

James M. Knowlson, Edwin Mowat Henry, Edward Wilson Boyd, Reginald Rudgerd Boulton, William Arthur Campbell, Arthur Luke Rundle, Frederick Laing Fraser.

JUNIOR CLASS.

James F. Williamson, John Thacker, Edmund Walker Head Van Allen, Robert George Code, William Robert Smyth, William Nassau Irwin, Edward Herbert Ambrose, George Edgar Martin, John Smith Meek, Archibald McKechnie, William Henry Tweedale, Thomas Francis Johnson, Sidney Chilton Mewburn, George Hutchison Esten, William Lawrence Leslie.

The following gentlemen passed their examination as Articled Clerks.

Albert Wesley Benjamin, John Hambly, James Joseph Berry.

RULES

As to Books and Subjects for Examination, as varied in Hilary Term, 1880.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and

presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

Students-at-Law.

CLASSICS.

1881. Xenophon, Anabasis, B. V.
Homer, Iliad, B. IV.
Cicero in Catilinam, II., III., IV.
Ovid, Fasti, B. I., vv, 1-300.
Virgil, Æneid, B. I., vv. 1-304.

1882. Xenophon, Anabasis, B. I.
Homer, Iliad, B. VI.
Cæsar, Bellum Britannicum, (B. G. B. IV. c. 20-36, B. V., c. 8-23.)
Cicero, Pro Archia.
Virgil, Æneid, B. II., vv. 1-317.
Ovid, Heroides, Epistles V. XIII.

1883. Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.
Cæsar, Bellum Britannicum.
Cicero, Pro Archia.
Virgil, Æneid, B. V., vv. 1-361.
Ovid, Heroides, Epistles V. XIII.

1884. Xenophon, Anabasis, B. II.
Homer, Iliad, B. IV.
Virgil, Æneid, B. V., vv. 1-361
Ovid, Fasti, B. I., vv. 1-300.
Cicero, Cato Major.

1885. Xenophon, Anabasis, B. V.
Homer, Iliad, B. IV.
Cicero, Cato Major.
Virgil, Æneid, B. I., vv. 1-304.
Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid, Bb. I., II., III.

ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a selected Poem:—

1881.—Lady of the Lake, with special reference to Cantos V. and VI.

1882.—The Deserted Village.
The Task, B. III.

1883.—Marmion, with special reference to Cantos V. and VI.

1884.—Elegy in a Country Churchyard.
The Traveller.

1885.—Lady of the Lake, with special reference to Canto V.
The Task, B. V.

Articled Clerks.

1881- Ovid, Fasti, B. I., vv. 1-300; or,
Virgil, Æneid, B. II., vv. 1-317.
Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—N. America and Europe.
Elements of Book-keeping.

Articled Clerks will be examined in the same years the same portions of Ovid or Virgil, as noted above for Students-at-Law, at the option of the candidate.

HISTORY AND GEOGRAPHY.

English History from William III. to George III., inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek:—

FRENCH.

A paper on Grammar.

Translation from English into French Prose:—
1881.—Emile de Bonnechose, Lazare Hoche.

OR, NATURAL PHILOSOPHY.

Books.—Arnott's Elements of Physics, 7th edition, and Somerville's Physical Geography.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination, to be passed in the third year before the final Examination, shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery; O'Sullivan's Manual of Government in Canada; the Dominion and Ontario Statutes relating to Bills of Exchange and Promissory Notes, and Cap. 117, R. S. O., and amending Acts.

The Subjects and Books for the Second Intermediate Examination to be passed in the second year before the Final Examination, shall be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing, (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law; Underhill on Torts; Caps. 49, 95, 107, 108, and 136 of the R. S. O.

FINAL EXAMINATIONS.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Smith on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Harris's Principles of Law, and Books III. and IV. of Broom's Common Law, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Smith on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

The Primary Examinations for Students-at-Law and Articled Clerks will begin on the Second Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

Canada Law Journal.

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DIARY FOR MAY.

1. Sun....2nd Sunday after Easter.
3. Tues...Supreme Court sittings, Primary Exam.
4. Wed....Primary Exam.
5. Thurs..Primary Exam.
8. Sun.....3rd Sunday after Easter.
9. Mon....Hon. George Brown died, 1880.
10. Tues...Court of Appeal sitt. begin. Co. Court sitt. for York begin.
11. Wed...Final Examination.
12. Thurs..Final Examination.
13. Fri.....Final Examination.
14. Sat.....Final Examination.
15. Sun.....4th Sunday after Easter.
16. Mon....Easter Term begins.
18. Wed..D. A. Macdonald, Lieut.-Gov. Ontario, 1875.
21. Sat....Confederation of B.N.A. Provinces proclaimed, 1867.
22. Sun....Rogation Sunday. Earl Dufferin Gov.-General, 1872.
24. Tues..Queen's Birthday, 1819.
25. Thurs..Ascension Day.
29. Sun.....1st Sunday after Ascension.
30. Mon...Proudfoot, V. C., appointed, 1874.

TORONTO, MAY 15, 1881.

IT is said by the *Legal News* that a suggestion recently made to appoint a Chief Justice of the Superior Court for the Montreal Division, in the Province of Quebec, is to be carried out; and that Mr. Justice Johnson, the senior Judge of the District, will be the first Chief Justice.

WE PUBLISH in another place a decision of the County Judge of Leeds and Grenville, holding that a claim is recoverable in a Division Court on a promissory note over $100, and under $200, even though part of the claim is for notarial charges, which of course are not "ascertained by the signature of the defendant." A case recently came before Judge Ardagh of Barrie (*McCutcheon* v. *Cresswicke*), where a somewhat similar point came up for decision. He held, under the same section of the act, that overdue interest was recoverable although the amount of the claim thereby exceeded $100. This case will come up again on a motion for prohibition, but the view of the learned judge will probably be sustained.

A CONSIDERATION of these matters suggests to us the thought that some provision should be made for the representation of the views of the judge of the court below, when constitutional points arise, and his decision comes up for review in cases of prohibition, &c. The law must, we presume, be settled at the expense of individual litigants, but it often occurs, and naturally enough, that a Division Court suitor is not sufficiently interested to employ counsel, and the consequence is that the grounds on which the case has been decided are not brought to the attention of the appellate tribunal. It would not be worth while to provide for every case of the kind, but it might be desirable so to arrange that the Attorney-General should intervene in support of the judge's ruling in cases involving important points such as questions of jurisdiction of inferior courts, construction of statutes, &c. The details could easily be worked out if the principle should commend itself to the Attorney-General. Some such provision is all the more necessary where, as in Ontario, the Legislature is composed of only one chamber and the legislation is very hurried, and the statutes not unfrequently far from being worded with exactness or clearness.

A CORRESPONDENT sends us the report of a Division Court case for publication; but as we think the judge was wrong in his ruling, we prefer simply to note the decision

briefly, and only this because it may be useful to refer to a course of procedure which was not only indefensible as a matter of strict practice, but undesirable even in a Court of equity and good conscience. An action was brought by a woman suing as her husband's administratrix. At the trial it appeared that although the action was commenced in November last, letters of administration were not applied for until the January following, and it did not even appear that the letters were in fact *ever* granted. The judge is reported to have held that the letters when granted would relate back and clothe the plaintiff with proper authority. Suppose, however, that the letters never should be granted? Possibly if they had been produced at the trial, it might not have been unreasonable for the judge to refuse a motion for a nonsuit, but there are manifest reasons why no greater latitude should have been allowed.

THE rage for early notes of recent decisions has reached the shores of the Pacific, and the Provincial Secretary of British Columbia has allowed the dreary pages of the *Official Gazette* to be enlivened by notes of cases, furnished by the judges. The number of the *Gazette* now before us gives, amongst others, the ruling of the Chief Justice on a conviction under the Fishery Act. The fishery officer, who we should judge to be more zealous than learned, seems to have convicted a disciple of Izaak Walton of fishing during a prohibited period, without putting the alleged offender to the trouble of defending himself, on the supposition that the words "convict on view" gave him that power. The outraged feelings of the British subject found vent in a *certiorari* and the Chief Justice promptly put in force the principle of natural justice that every accused person should have an opportunity of defending himself. In another case a magistrate made a conviction in the same free-and-easy manner, on an information charging him with playing cards for money, without more. A solemn warning, no doubt, but the effect of which was completely spoiled by the Chief Justice quashing the conviction on the ground that what was done was no offence at all, unless in a public place, gaming house, &c., which was not alleged. Most of the other cases refer to matters of procedure under the recently enacted Judicature Act of our sister Province.

THE RESIGNATION OF VICE-CHANCELLOR BLAKE.

We deeply regret that Mr. Vice-Chancellor Blake has resigned his seat on the Bench, apparently to return to the practice of his profession. We do so for the following amongst other reasons. In the first place, we deem it highly undesirable that any Judge should leave the Bench and return to the Bar, for practice in the Court on which he has lately presided. We believe that it tends more or less to impair confidence in the due administration of justice, and it certainly finds no sanction in British usage. In the United States, under a different system, *election* to the Bench is often sought for, that when the incumbent's term of office expires he may be able again to enter the professional struggle with the prefix "judge" to give him the reputation of being a popular, if not a learned lawyer; but we are assured the practice is strongly objected to by the friends of the profession in the United States. Nothing of that sort is, of course, applicable here; but there is a strong feeling that a descent from the Bench to the Bar (of which unhappily we have now had two within a comparatively few years) is only allowable if at all under very peculiar circumstances.

An objection also exists, in the fact that public business, for a time, at least, suffers b

changes in the Bench, and in this particular case they will suffer from the loss of a learned and most industrious judge trained in the duties of his office, his place being filled by an untried, but more especially by an untrained man. No matter how excellent the new judges of the Court of Chancery may prove, the presence of two who are necessarily devoid of judicial experience, may, for a time at least, be productive of some little embarrassment and occasional delay. We regret this step, also, on Mr. Blake's own account, inasmuch as many not familiar with the moving causes may possibly think that he was actuated by motives which we feel confident had no place in inducing him to take the step he has taken.

It cannot be denied that the deep and pronounced interest which Mr. Blake has shown, in word and deed, in philanthropic and Christian work has provoked hostile comment. His course was aggressive, and he came in contact with very strong interests; and whilst many have applauded his earnest action in such matters, others have not hesitated to state openly their objections; in fact have gone so far as to make unfavorable representations to the Government on the subject. The rule that "once a puisne always a puisne," is well recognized in England, but in this country is as much honored in the breach as the observance. As far as Mr. Blake's qualifications for the office of Chancellor are concerned, few will deny them; nor was the Government embarrassed in the selection of a good man to take the Vice-Chancellor's place in case of his promotion, inasmuch as Mr. Boyd, recognizing the services of one who was and is an old and valued friend, and his fitness for promotion to the vacant office, expressed his willingness to take the lower position. Under these circumstances it must be assumed that the Government, if not adopting the precedent they had before them in the appointment of the late Chief Justice Harrison, gave weight to the opinion that the line which Mr. Blake has marked out for himself, in regard to the matters referred to, was incompatible with the position of Chancellor, and if incompatible with that position, was also undesirable for one holding the office of Vice-Chancellor. For our part, we utterly repudiate any doctrine that would cripple the Christian liberty of a judge—that would compel the man, who of all others should be an exemplar of morals in a community, to hide his principles and his conviction. But the conclusion to a conscientious mind was, under these circumstances, not unnatural, either for the person interested to give up the prominent part that he felt it his duty to take in reference to the temperance question and to other philanthropic and religious matters, or to resign his position on the Bench. He has chosen the latter course. Whilst, as we have said, we deeply deplore this result, and whilst many who love their country and hold in high reverence the judicial position, think that the circumstances did not warrant the action taken, and whilst others again who approve of the step, regret that it should have been taken at this particular juncture, those who appreciate the motives already referred to, will admire the strength of character of one who is prepared to stand by his convictions.

RECENT JUDICIAL CHANGES.

The long delayed appointments having at length been made, it is our pleasing duty to record them. The Hon. John Godfrey Spragge, who has been Chancellor for the past twelve years, now sits as Chief Justice of the Court of Appeal of Ontario. His long judicial service, extending over a period of forty-four years (dating from his appointment as Master of the Court of Chancery in 1837), his learning and reputation, made his appointment a foregone conclusion on the death of

his lamented predecessor. He has well earned his promotion. The feeling of the Bar on the subject was plainly evinced by the congratulations he received at the various county towns where he held Court on his recent circuit; in fact, his progress was a sort of triumphal procession, judging from the numerous addresses presented to him and the dinners given in his honor. It would be almost presumption for us to speak at length of one with whose merits the profession are so well acquainted, and of whom we can say nothing that is not known to all. We shall, therefore, content ourselves with re-echoing the sentiments expressed by Mr. Bethune, Q.C., who, as senior counsel present on the occasion of his taking his seat on the opening of the Court of Appeal, tendered him the congratulations of the Bar. Mr. Bethune said:

"Before proceeding with the business of the Court, I desire, on behalf of the Bar, to offer Your Lordship our congratulations on your elevation to the high office in which you are now placed. We all regret, in common I am sure with Your Lordship, the event which rendered vacant the place you now occupy. The late Chief Justice—a distinguished judge, an able lawyer, and a splendid man—had endeared himself to all of us. Whilst regretting his early death, it gives us the greatest possible pleasure now to bear testimony to the great reputation which your Lordship attained as Chancellor in the Court of Chancery, and we now desire to express the hope that Your Lordship may be spared many years to preside over this Court, and, if possible, add to that reputation."

The Chief Justice in reply said:

"I esteem it a great honor to receive this address on behalf of such a body of gentlemen as the Bar of Ontario, not only as a mark of personal regard to myself, but also as indicating the kindly feelings which have always existed, not alone between myself and the Bar, but between the Bench and the Bar generally; a feeling on which we may well congratulate ourselves, as it not only makes the administration of justice more pleasant, but also, no doubt, conduces to its due administration in this Province. I join heartily with you in what you have said with reference to the learned and able gentleman who occupied the place which I am now called upon to fill. I believe him to have been all you have described, and an able and upright judge in everything on which he was called to adjudicate. I feel I ought not to omit to allude to the other gentlemen who have preceded me in the office I now hold. The first was the Honorable Sir John Beverley Robinson, who has been well called the Mansfield of Canada, and after him the learned and able Chief Justice Draper. Nor ought I to forget those who have preceded me in the Court I have just left. The first Chancellor was the late Hon. Mr. Blake. He was well chosen as a fit and proper person to mould and fashion the new system of jurisprudence, after the change from one to three Judges on the Bench. He labored earnestly and wisely in what was then successfully accomplished. He and Mr. Vankoughnet who succeeded him, did their best, I am sure, that above all things no suitor in the court should suffer by fault or negligence of theirs. Nothing gratified me more during my late circuit than to learn the position now occupied by the Court of Chancery compared with the position it occupied at first, when it was looked upon by suitors with prejudice and distrust. It is now regarded as the redresser of wrongs, and as giving remedy where no other remedy exists. With regard to the Bar, I know of no body of men who more appreciate real probity and what is justly right and honorable than the Bar of Ontario."

We turn now from the head of the judiciary of Ontario who has grown grey in the service of his country to the appointment of his successor on the Chancery Bench. We do so with feelings of pleasure of no ordinary kind. The promotion of Mr. John A. Boyd, Q. C., has met with unqualified approval from the bar and the country. The new Chancellor is known to all as a courteous gentleman and a favorite in the profession, a scholar of high attainments, an accomplished lawyer, gifted with an eminently judicial cast of mind, and, above all, one whose high moral excellence is all that could be wished for in one who holds a position which none should fill but those

who can looked up to with respect by all classes of the community.

Mr. Boyd, who is a gold medallist of the University, was called to the Bar in Michaelmas Term, 1863, and commenced his professional career in partnership with Mr. D. B. Read, Q.C. He subsequently became a partner in the firm of Blake, Kerr & Boyd. In October, 1870, he was appointed Master-in-Chancery, in the room of Mr. Buell. This office he resigned in 1872, and again entered the firm with which he had been previously connected.

Like Mr. Vice-Chancellor Blake, he began life by entering on mercantile pursuits; this, however, he soon left for the more congenial atmosphere of Osgoode Hall. He is a member of the Baptist Church, and occupies a high position in the Christian world. He has attained his present high position at an early age.

The Chancellor was sworn in by the Lieutenant-Governor of Ontario on the same day as Chief Justice Spragge. On taking his seat in the Court of Chancery, Mr. James Beaty, Q.C., on behalf of the Bar, addressed the Chancellor as follows :—

"Before the business of the court begins, I have pleasure on behalf of the Bar to express our satisfaction at your Lordship's elevation to the Bench. I am quite sure that the whole Bar congratulates your Lordship on this well-merited recognition by the Crown of your Lordship's standing and reputation at the Bar, and we are quite persuaded, from your achievements while in the profession, that you will follow closely in the steps of those able and distinguished men who have preceded you. We trust that you may long be spared to be an ornament to the Bench, as you have been a credit to the Bar. The lawyers of Ontario and the public have also much to congratulate themselves upon, in the fact that the services of the late Chancellor have been retained in a higher sphere ; and we are prepared to give him and those who preceded him great credit for establishing in this country that system of equity jurisprudence which in principle, and especially in its practical and faithful administration, is second to none in the world."

The Chancellor in reply spoke to the following effect:—

"It would be mere affectation on my part to say that I am not gratified by my appointment to this position, not merely by the fact, but also by the manner of it, and especially by the manner in which it has been received by the profession. The preferment came upon me unsolicited, and I value it all the more on that account. From the congratulations I have received from members of the Bar privately and thus publicly, I feel encouraged and emboldened to hope that I may be able in some measure to answer the anticipations you have expressed. I feel that it is a matter of no small difficulty to discharge the duties of this office, filled as it has been by the distinguished men and eminent jurists to whom you have referred. I trust, however, that, aided by your sympathy and co-operation, I may be able in some degree to follow in the steps of my predecessors in office. There is one thing I shall never forget, that I myself have been a member of the Bar, and that under our system the Bench and the Bar are so dependent on each other that one cannot afford to slight or to belittle the other. Wherever we find the Bar industrious and able, we find the same qualities on the Bench. These considerations induce me to hope that I shall not fail in discharging my duty to the Bar and to the public as well. No happier omen could happen at the outset of my judicial career than the words of welcome you have given me. I hope that in the future I may never do or say anything which will cause any one of you to regret or to retract one word of the encouragement and commendation you have expressed to-day."

RETROACTIVE LEGISLATION.

The Act passed in the recent session of the Ontario Legislature "for Protection of Public Interest in Rivers, Streams, and Creeks" (c. 11), has, by virtue of some of its provisions, caused public attention to be turned to the question of retroactive legislation. It is obviously of great importance that, if possible, sound principles of legisla-

tion should be ascertained and followed in this matter. Parliament being practically omnipotent, it is only by the prevalence of sound ideas of public morality in the community that there can be any protection against acts of gross tyranny. Indifference to vested rights has been long noted as one of the characteristics of modern democracy, and any danger there may be in this tendency is obviously increased where the legislative body is small,—where there is only one House,—and where measures are passed and become law with great rapidity, and often after only slight discussion.

"All *ex post facto* laws are more or less unjust," is a dictum of Vankoughnet C., in *Low* v. *Morrison*, 14 Gr. 192. But a very slight consideration of the subject shows that there are different kinds of retroactive laws, and if all are objectionable, they certainly are so in very different degrees. For example, the above dictum of the Chancellor was uttered in reference to 25 Vict., c. 20, which abolished the extended period for bringing an action formerly given to absentees, but allowed a year's grace from the date of passing, during which actions brought should not be affected. This concession obviously renders the statute far less open to objection than it would have been had it laid it down simply that "such had always been the law." The statute 21 Jas. I., c. 16, sec. 7, which 25 Vict., c. 20, amended, did not permit time to run against an absentee at all. If, then, the 15 Vict., c. 20 had specially excluded from its operation all who were absentees at the date of its passing, it would in no sense have been retroactive; but would have been analogous to the Act respecting the rights of aliens in real property (R. S. O., c. 97), which enacts that nothing therein contained shall affect any right or title legally vested in, or acquired by, any person whomsoever before the passing of the Act.

Where, however, the statute gives due notice that the law shall not have any operation till after a definite and extended period, during which actions may be brought, the rule against laws being construed to have a retroactive effect does not apply. (Dwarris on Statutes 542, Ed. 2, *Towler* v. *Chatterton*, 6 Bing. 258; *Reg.* v. *Leeds and Bradford Ry.*, 21 L. J. M. C. 193.)

Another kind of retroactive statute is that referred to by Mr. Hardcastle (Const. of Stats. 198), in illustration of his statement that sometimes it is expressly enacted that an enactment shall be retrospective. It is the only example he cites in support, and is the Imp. 22-23 Vict., c. 35, sec. 32, which 23-24 Vict., c. 38, sec. 12, enacts shall operate retrospectively. This statute authorizes any trustee, where not expressly forbidden by the instrument creating his trust, to invest any trust funds on real securities in any part of the United Kingdom, or in certain stock, and declares he shall not be liable on that account merely, as for a breach of trust.

We can distinguish a third kind of retrospective legislation in the Imp. 6 Geo. IV. c. 16, which enacts that (secs. 54, 55) it shall not be lawful for an annuitant to sue the surety for the payment of his annuity when the grantor has become bankrupt, until he shall have proved under the commission against such bankrupt for the value of such annuity or for the payment thereof; which statute was declared in *Bell* v. *Bilton* 4 Bing. 615, to be retrospective, and to apply to annuities granted before the statute was passed.

Again, there are cases where Acts have apparently, but not in reality, a retrospective operation. Thus, since by the Wills' Act, Imp. 7 Will. IV. c. 26, sec. 24 (R. S. O. c. 106, sec. 26) every will is construed as taking effect as if it had been executed immediately before the death of the testator, it comes to pass that if an Act of Parliament is passed after a will has been executed, but before the death of the testator, the will may be affected by the Act. (Hardcastle Const. of Stat. 207; *Capron* v. *Capron*, L. R. 17 Eq. 295; *Haslock* v. *Pedley*, L. R. 19 Eq. 273).

Lastly, there are certain statutes which

appear to be of the kind referred to by Jessel, M. R., in *re Joseph Suche & Co.*, L. R. 1 Ch. D. 50, where he says:—"It is a general rule that when the legislature alters the rights of parties by taking away or conferring any right of action, its enactments, *unless in express terms they apply to pending actions*, do not affect them." There have been statutes passed in England at different times taking away the right of prosecuting certain pending *quitam* actions to recover penalties for certain kinds of gaming; *e.g.*, Imp. 8 and 9, Vict., c. 109, sec. 16.

It is easy to distinguish all such cases from the recent act of the Ontario legislature. In the first kind mentioned a certain time is given during which vested rights may be enforced to their full extent; in the second, if not made retrospective, trustees would have had to remove any trust funds then invested in such funds and securities simply to re-invest them in similar ones and then claim the benefit of the statute; the third kind rather relate to modes of procedure than affect vested rights; while the last relating to actions by informers can scarcely be called an interference with vested rights.

We have not found any precedent really parallel to the Act we are principally concerned with. By R. S. O., c. 115, sec. 1,—(C. S. U. C., c. 48, sec. 15), it was enacted that all persons might float saw-logs and timber down all streams. In *Boale* v. *Dickson*, 13 C. P., 337, it was held that a river, not before capable of being used for running timber, was not brought within the statute by reason of its being rendered available for such purpose by the erection of a slide. This case was followed by *Whelan* v. *McLachlan*, 16 C. P. 102, and the law remains thus declared by properly authorized courts, in discharge of their proper function in the commonwealth. The new Act, however, (sec. 2), gives a right to all persons to use rivers on which improvements *necessary to render them navigable or floatable* have been made by others for the purpose of floating down timber, subject to the payment of reasonable tolls, which (sec. 4) are to be fixed by the Governor in council. It, then, proceeds to enact (sec. 5): "The foregoing provisions of this Act shall apply to all such constructions and improvements as have hitherto been made, as well as to such as may be in course of construction or shall hereafter be constructed." And (sec. 10) if any suit is now pending, the result of which will be changed by the passage of this Act, the court, or any judge of such court, having authority over such suit or over the costs, may order the costs of the suit or any part thereof to be paid by the party who would have been required to pay such costs if this Act had not been passed.

There is no need to call attention to the practical results of these retroactive sections. The case of Mr. McLaren, which notoriously gave rise to the Act spoken of, illustrates them clearly enough. A man who had been just declared by a properly authorized court to be vested with a valuable property and legal rights, has had those rights, not purchased, but deliberately taken away from him by the Legislature. It is indeed difficult to see on what principle such legislation can be defended.

For our own part we feel disposed to say with Burke in his Reflections on the French Revolution: "We entertain a high opinion of the legislative authority; but we have never dreamt that parliaments had any right whatever to violate property, to over-rule prescription. . . . . I find the ground upon which your confiscators go is this; that indeed their proceedings could not be supported in a court of justice; but that the rules of prescription cannot bind a legislative assembly. So that this legislative assembly of a free nation sits, not for the security, but for the destruction of property, and not property only, but of every rule and maxim which can give it stability."

STREET RAILWAYS.

While rival street railway companies are invoking the aid of motions, affidavits, injunctions, and the choicest weapons of the legal armory in general, to assist them in their beneficent mission, it may not be amiss to call attention to the recent American case of *Walling* v. *Germantown Passenger Railway Co.*, which sets in a strong light the almost forgotten, or we should rather say, neglected principle, that such companies owe certain duties to the public as well as to themselves. The action was brought for the death of Bernard Walling, through the alleged negligence of the defendant company. Over four years ago the deceased, who was standing on the front platform of a crowded street-car, and only able to keep his place thereon by holding with one hand to the iron of the dasher, and with the other to an iron bar under one of the windows, was forced from his hold by several passengers being thrown against him while the car was rounding a corner, the result being that he was run over and killed. From a judgment in favor of plaintiff in the court below, the defendants took a writ of error. The judgment of the court below has, however, been sustained, and the doctrine re-affirmed that "riding on the front platform of a street-car which is crowded is not contributory negligence *per se*, precluding a recovery for the death of a passenger occurring while so riding." We may remind our readers of the somewhat analogous case in our own Courts of *Cornish* v. *The Toronto Street R. Co.*, 23 C. P. 355, where it was held that the fact of the plaintiff not proving affirmatively that he was holding on to the iron rail of the front platform of a crowded car, at the time when he was thrown off by a jolt and injured, was not a ground for non-suit.

The judgment of the Pennsylvania Supreme Court is given *in extenso* in the *Albany Law Journal* (Vol. 23, p. 371), and will be found very interesting and conclusive. We quote two or three sentences, the truth and appositeness of which will commend themselves to every Torontonian at least.

"Conductor, driver, and passengers acted as if there was room, so long as a man could find a rest for his feet and a place to hold on with his hands. Nor was that action exceptional. Notoriously it was very common in 1876, and perhaps it is not infrequent at this day. The companies do not consider such practice dangerous, for they knowingly suffer it and are parties to it. Their cars stop for passengers when none but experienced conductors could see a footing inside or out. The risk in travelling at the rate of six miles an hour is not that when the rate is sixty or even thirty. An act which would strike all minds as gross carelessness in a passenger on a train drawn by steam-power, might be prudent if done on a horse-car. Rules prescribed for observance of passengers on steam railroads, which run their trains at great speed, are very different from those on street railways. In absence of express rules every passenger knows that what might be consistent with safety on one would be extremely hazardous on the other.

"Street railway companies have all along considered their platforms a place of safety, and so have the public. Shall the court say that riding on a platform is so dangerous that one who pays for his standing there can recover nothing for an injury arising from the company's default?"

BURIAL GROUNDS—WHEN A NUISANCE.

We recently referred (*ante*, p. 184) to two peculiar cases decided in the United States Courts, bearing upon the rights of husbands and wives to choose the last resting place of their deceased partners in life. The minds of our readers will therefore be prepared for another case presenting a somewhat different aspect of this grave subject. It has been decided by the Maine Supreme Judicial Court in the case of *Monk* v. *Packard* that a burial ground

per se is not a nuisance; *i.e.*, that in order to become a nuisance "the graves or their contents must be such in their effect as naturally to interfere with the ordinary comfort physically of human existence, and the inconvenience must be something more than fancy, delicacy or fastidiousness." In this case the defendants had removed a family graveyard of theirs from one part of their property to another, the result being that the graves which in their original location could only be seen from the back rooms of the plaintiff's house, were in their new position plainly visible from the front windows and door, the nearest grave being about forty feet from and opposite to the window of his sitting-room. The plaintiff, not unnaturally, objected to this unexpected addition to the landscape, and sought solace for his wounded susceptibilities in an action on the case for nuisance, the damage done him being in due course of law assessed by a jury at twenty-five dollars. This verdict has, however, been set aside by the Supreme Court, who held that there was no sufficient evidence of damage to the plaintiff's physical healthlth,or his olfactories, or the water in his well, resulting from the alleged nuisance, and that the depreciation in the market value of his property, and the interference with the comfortable enjoyment of his dwelling-house, looked at from a mental point of view, were not sufficient grounds in law to sustain the verdict. The part of the judgment which deals with the latter branch of the case is interesting and clearly stated, and we therefore make no apology for reproducing it.

"Nor can the verdict be sustained upon the sole ground of the cemetery's proximity to the plaintiff's premises and the consequent depreciation of the market value of his property. For a repository of the bodies of the dead is as yet indispensable, and wherever located it must *ex necessitate* be in the vicinity of the private property of some one who might prove its market value injuriously affected thereby. *New Orleans* v. *Wardens, etc.*, 11 La. Ann. 244.

But assuming that the jury, in respect to these matters, found in behalf of the defendants and concluded that there was no injury to the plaintiff's property, or to his physical health or comfort, and based their verdict solely on the ground that on account of its relative position with the plaintiff's house, the cemetery inevitably meets his immediate view whenever he looks from the north window of his sitting-room or steps from his door, and that thereby the comfortable enjoyment of his dwelling-house is interfered with—then the defendants contend that the verdict is against law—upon the ground that such discomfort is one purely mental, and is not a cause of action.

It cannot be doubted that the law recognizes that to be a nuisance which is naturally productive of sensible personal discomfort as well as that which causes injury to property. *St. Helen's Smelting Co* v. *Tipping*, 11 H. L. Cas. 642. But it must injuriously affect the senses or nerves. Thus sound, whether caused by a locomotive blowing off steam, the ringing of bells or the barking of dogs, whenever it becomes sufficient to injuriously affect residents in the neighborhood, is actionable. *First Baptist Church* v. *R. R. Co.*, 5 Barb. 79, and cases there cited. To become actionable, the effect of sound must be such as naturally to interfere with the ordinary comfort, physically, of human existence, and the inconvenience must be "something more than fancy, delicacy, or fastidiousness." Cooley on Torts, 600.

Cemeteries are not necessarily even shocking to the senses of ordinary persons. Many are rendered attractive by whatever appropriate art and skill can suggest, while to others of morbid or excited fancy or imagination they become unpleasant and induce mental disquietude from association, exaggerated by superstitious fears. The law protects against real wrong and injury combined, but not against either or both when merely fanciful.

The human contents of these graves cannot, as they lie buried there, offend the senses in a legal point of view. The memorial stones alone affect the senses, and the same would result to the superstitious, though nothing human lay beneath them. If this burial ground is under the circumstances a private nuisance, then it is also a public nuisance to every traveller who passes on that road, as well as every soldier's monument in the country. See

Cooley on Torts, 602 *et seq.*; *Barnes* v. *Hathorn*, 54 Me. 124.

We think the verdict is against law, and it must be set aside."

NOTES OF CASES.

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SUPREME COURT.

From Ontario.] [April.

COSGRAVE v. BOYLE.

Promissory note—Death of endorser—Notice of dishonor—37-38 Vict. c. 47, Sec. 1. D.

The appellants discounted a note made by P. and endorsed by S. in the Bank of Commerce. S. died, leaving the respondent his executor, who proved the will before the note matured. The note fell due on the 8th May, 1879, and was protested for non-payment, and the Bank, being unaware of the death of S., addressed notice of protest to S. at Toronto, where the note was dated, under 37-38 Vict. c. 47, sec. 1 (D). The appellants, who knew of S.'s death before maturity of the note, subsequently took up the note from the Bank, and relying upon the notice of dishonor given by the Bank, sued the defendant.

Held, reversing the judgment of the Court of Appeal for Ontario, that the holders of the note sued upon when it matured gave a good and sufficient notice to bind the defendant, and that the notice so given enured to the benefit of the appellants.

O'Sullivan, for appellants.

McMichael, Q. C., for respondent.

SUMMERS v. COMMERCIAL UNION ASSURANCE COMPANY.

Interim receipt—Agent, power of—Broker cannot bind company.

This was an action brought on an interim receipt, signed by one D. Smith, as agent for the respondent company at London. One of the pleas was that Smith was not respondents' duly authorized agent as alleged. The General Managers of the company for the Province of Ontario—Messrs. Westmacott and Wickens—had appointed, by a letter signed by both of them, one Williams, as general agent for the city of London. Smith, the person by whom the interim receipt in the present case was signed, was employed by Williams to solicit applications, but had no authority from or correspondence with the head office of the company. In his evidence Smith said he was authorized by Williams to sign interim receipts, and the jury found he was so authorized. He also stated that Westmacott was informed that he (Smith) issued interim receipts, and that Westmacott said he was to be considered as Williams' agent. There was no evidence that Wickens, the other head officer, knew what capacity Smith was acting in.

Held, affirming the judgment of the Court of Appeal for Ontario, that Williams had no power to delegate his functions, and that Smith had no authority to bind the respondent company.

H. Cameron, Q. C., and *Bertram* for appellant.

C. Robinson, Q. C., and *Miller* for respondents.

From New Brunswick.]

RAY, et al, v. LOCKHART, et al.

Will—Surplus—Whether residuary personal estate of testator passed.

Among other bequests the testator declared as follows: "I bequeath to the Worn-out Preachers' and Widows' Fund, in connection with the Wesleyan Conference here, the sum of £1,250; to be paid out of the moneys due me by Robert Chesnut, of Fredericton. I bequeath to the Bible Society £100. I bequeath to the Wesleyan Missionary Society, in connection with the Conference, £1,500." Then follow other and numerous bequests. The last clause of the will is, "Should there be any surplus or deficiency, a *pro rata* addition or deduction, as may be, to be made to the following bequests, namely,—The Worn-out Preachers' and Widows' Fund, Wesleyan Missionary Society, Bible Society." When the estate came to be wound up, it was found that there was a very large surplus of personal estate, after paying all annuities and bequests. This surplus was claimed

on the one hand under the will by these charitable institutions, and on the other hand by the heirs at law, and next of kin of the testator, as being residuary of his estate undisposed of under his will.

Held, affirming the judgment of the Supreme Court of New Brunswick, that the "surplus" had reference to the testator's personal estate, out of which the annuities and legacies were payable, and, therefore, a *pro rata* addition should be made to the three above named bequests, Statutes of Mortmain not being in force in New Brunswick.

Barker, Q. C., and *Sturdee*, for appellants.
Kaye, Q. C., and *Stockton*, for respondents.

COURT OF CHANCERY.

FULL COURT—APRIL 19.

ANDERSON V. BELL.

Will—Construction of—Distribution of estate—Accumulation—Per capita or per stirpes.

The testator bequeathed his residuary estate, all other property, in lands, mortgages, stocks, to his grandchildren, "the children of J. C., and of my daughter, A. J. B., wife of D. B., share and share alike, on their coming of the age of twenty-five years, to be finally determined and paid to them on the youngest coming of the age of twenty-five years. Provided, nevertheless, that each on coming of the age of twenty-five years receives a portion of not more than half what their share will be on the youngest coming of age. (Then directions were given as to keeping books of accounts and managing the estate). And when the books so audited show the revenue of my said estate, after paying the before mentioned bequests, taxes, and other charges on the same, amounts to £500, then half of such revenue or income be divided, share and share alike, between the families of my son, J. C., and the family of my daughter, A. J. B." (The other half going into the estate).

Held, (1) that the children referred to took *per capita*, and not *per stirpes*. (2), that when the eldest attained the age of twenty-five years he was entitled to receive one half of his share, payment of which could not be delayed, and that date must be taken as the period at which those to take were to be ascertained; and that any child born subsequent to the time the eldest child attained twenty-five was excluded; and all born before that period were entitled to share in the estate. (3), that the children did not take vested interests—the gift to each being contingent on the attaining of twenty-five. (4), that twenty-five was the age at which the parties became entitled to an arrangement as to the amount of their shares; and (5), that the trustees could charge the shares of any who had been overpaid with the excess of such payments.

April 22.

IN RE TRELEVEN & HORNER.

Vendors and Purchasers' Act—Description of lands conveyed—Assent to sale by tenant for life—Appointment of interested trustee—Practice.

A description of land in a deed, which refers to the same as part of a lot whose number is given, and which then goes on to say that the metes and bounds are more particularly set out in a deed, which is referred to by date, names of parties, date and number of registration, is a good description.

Land was settled on a trustee, in trust for the use of H. till marriage, and then upon other trusts for the husband and wife as tenants for life, and ultimately providing for the issue; the assent of the tenant for life was necessary for a sale; and there was power in the deed to appoint H. as a trustee on the original trustee's refusing etc., to act. The trustee had an absolute discretion as to forfeiting and applying the estate among or for the benefit of the parties to the deed in case of anticipation or attempted anticipation. The original trustee resigned and appointed H. and conveyed to him.

Held, that the consent of H. and his wife as tenants for life satisfied the condition as to the assent in case of a sale; that H. as trustee was entitled to receive the purchase money, and that the purchaser was not bound to see to its application.

But it having been suggested by the Court that the appointment of H. as trustee was not one which the Court would have made, the matter again came on for argument, when it was

Held, that H. was placed in a position in which his interest as one of the parties to the deed upon forfeiture might conflict with his duty as trustee, and that the Court would not have made and could not sanction his appointment.

Though on a bill filed for specific performance, if the infant children ultimately entitled under the settlement were made parties, the Court might order the completion of the sale and payment of the money into Court for investment, where the *corpus* of the estate would be protected for the children, yet on an application under the vendors' and purchasers' act in the absence of the other parties to the settlement, it would not compel the purchaser to accept the title.

Blake, V. C.] [April 22.

RE FLETCHER et al.

Solicitor and client—Judgment and execution—Summary application.

Upon the taxation of solicitor's costs against their client it was shown that large sums of money belonging to their client had reached their hands, and after deducting the amount of the costs a considerable balance remained due the client, for which he had, under the order of taxation, issued an execution, but the sheriff had been able to realize only a small portion of the debt and thereupon a motion was made to strike the solicitors off the roll in default of payment of the amount remaining due. The Court, however, in view of the fact that the client had treated the claim as a debt from the solicitor to himself and proceeded to a sale of all that he could seize under the execution, he could not fall back on a right which he had and might have exercised; unless in addition to the non-payment of the money, misconduct on the part of the solicitor could be shown that would warrant the interference of the Court, and refused the application with costs.

CHANCERY CHAMBERS.

Blake V. C.] [March 1.

SINGER v. C. W. WILLIAMS MANF. COY.

Foreign commission—What must be shown on application for.

On an application for a foreign commission to examine a witness who is travelling, it should be shown that he will remain at the place where the commission is directed a sufficient time to allow of its due execution.

Hoyles, for the appellants,

Watson, for the plaintiffs.

COMMON LAW CHAMBERS.

Hagarty C. J.] [April.

REGINA *ex rel.* GRANT v. COLEMAN.

REGINA *ex rel.* DWYRE v. LEWIS.

Quo warranto—Municipal election—County Court Judge—Jurisdiction.

A County Court Judge directed the issue of writs of *quo warranto* returnable before him to test the validity of the election of certain aldermen of the city of Ottawa. Before appearance the same Judge set aside all proceedings with costs on certain exceptions to the writs taken before him.

Held, on an application for a *mandamus* to compel him to try the cases, that he had power to set aside the writs, and that his powers under the Municipal Act being co-extensive with those of a Superior Court Judge in such cases, there was no appeal from his decision.

Hagarty C. J.] [May 9.

WOODRUFF v. CANADA GUARANTEE CO.

Verdict—Interest.

In an action on a bond of indemnity it was agreed at the trial that plaintiff should have a verdict for $700, subject to a legal question which was afterwards decided in plaintiff's favor.

Held, that plaintiff was not entitled to interest on the verdict under R. S. O., ch. 50, sec. 269.

REPORTS.

ONTARIO.

COUNTY COURT OF LEEDS AND GRENVILLE.

BURNS V. ROGERS, ET AL.

Division Courts — Jurisdiction — Promissory note—Notarials.

Held, That an action to recover a balance of over $100, and less than $200, upon a promissory note which had been protested might have been brought in a Division Court, even though the notarial fees formed a part of the amount claimed by plaintiff.

[Brockville, April 14.

This action was brought to recover an amount of over $200 alleged to be due to plaintiff. At the trial at the last October sittings, without a jury, a verdict was rendered in favor of the plaintiff for $154. No certificate of costs was asked for.

Upon taxation of costs, the defendants contended that plaintiff was only entitled to Division Court costs, and that they had a right to set off County Court costs. The clerk declined to allow plaintiff County Court costs without the Judge's permission. The parties subsequently (14th April, 1881,) appeared before the Judge.

J. C. Ross for plaintiff, claimed that the fact of notarials having been included in the claim, and of the amount thereof not having been ascertained by the signature of defendants, ousted the Division Court of jurisdiction. He cited *Eaton* v. *Rosenthal*, in County Court of York (Nov. 25, 1880, not reported), *Elliott* v. *Gray*, cited in O'Brien's D. C. Manual, 1880, p. 14, *Keroack* v. *Scott*, County Court of Hastings, not reported, and CANADA LAW JOURNAL, ante, p. 136.

Webster for defendants, cited Con. Stat. U.C. cap. 42, secs. 13 and 14 (latter sec. carried into R. S. O., cap. 50, sec. 144); R. S. O., cap. 50, secs. 347 and 348; *Vogt* v. *Boyle*, 8 Prac. R. 249, and Division Court Act, 1880, sec. 2, and note thereto in Sinclair's D. C. Acts.

MCDONALD, Co. J.—The second section of the Division Courts' Act, 1880, extends the jurisdiction of those courts to "all claims for the recovery of a debt or money demand, the amount or balance of which does not exceed two hundred dollars and the amount or original amount of the claim is ascertained by the signature of the defendant or the person whom, as executor or administrator, the defendant represents." The balance found due to the plaintiff upon the note sued on in this cause was between $100 and $200, and could clearly have been recovered by suit in the proper Division Court at Gananoque. But the plaintiff insists that the amount found due included $1.44 for notarials and postages, and that such latter sum, not having been "ascertained by the signature of the defendant," the Division Court is ousted of jurisdiction. As a matter of fact I am, at this late date, unable to say whether the amount found due did include notarials and postages, but, assuming that it did, I still find against plaintiff's contention.

Section 13 of cap. 42 of Con. Stat. U. C. which, apparently, as being a matter for Dominion legislation, has been left untouched in the revision of the Statutes of Ontario, (see vol. 2, page 2374), enacts that "All bills, drafts, or orders drawn by persons in Upper Canada on persons in this Province, and all promissory notes made or negotiated in Upper Canada, if protested for non-payment, shall be subject to interest from the date of the protest, or if interest be therein expressed as payable from a particular period, then from such period to the time of payment; and in case of protest the expense of noting and protesting and the postages thereby incurred shall be allowed and paid to the holder over and above the said interest."

It is true that to enable the plaintiff to recover the amount of notarials proof must be given, either by the production of the protest or otherwise. But I do not think this alters the aspect of the case. The amount of such notarials is given to him by the statute, and I look upon it as a sort of accretion to his claim which is not to be considered in deciding as to whether an action could have been brought in the Division Court, unless indeed the amount of such notarials carries the whole amount of the claim beyond two hundred dollars.

It is with some doubt that I have arrived at this decision, and the more so as it differs from judgments which I understand have been already given by the learned Judge of the County Court of York, and the learned Judge of the County Court of Hastings. Possibly a

decision of a final nature might be obtained upon an application to one of the Superior Courts, or a judge thereof, for a *mandamus* to compel a Clerk of a County Court to tax County Court costs in a case in which this question is involved. Meantime, I must decide that the Clerk can only tax costs to the plaintiff upon the Division Court scale.

REVIEW.

A TREATISE ON THE LAW OF CHOSES IN ACTION, together with an Appendix of Forms and Statutes. By J. James Kehoe, of Osgoode Hall, Barrister-at-Law. Toronto: Carswell & Co., 1881.

Mr. Kehoe has chosen an important and difficult head of law for the subject of his first venture in legal authorship; nor has he had the advantage enjoyed by the great majority of legal writers, who profit by the researches, and take warning from the errors, of their predecessors. Mr. Kehoe, as he reminds us in his preface, has chosen a subject which has remained hitherto without a commentator,—a fact not greatly to be wondered at when we remember that the Statute which may be said in a sense to have created it, or at all events to have given it its peculiar character and importance, is only about eight years old. We refer, of course, to the Statute of 35 Vict., cap. 12 (R. S. O., cap. 116, ss. 6-12), which made choses in action assignable at law by any form of writing, and thus extended to common law a doctrine which had long been familiar to Courts of Equity. The little work before us is mainly, though by no means exclusively, concerned with the interpretation and illustration of the principles laid down in this Statute, and the reported cases depending thereon, which are of continually increasing number and importance. Mr. Kehoe's book is not, however, a mere commentary on a single statute, as a glance at the table of contents will show, but a clearly and logically arranged *resume* of the leading topics included in the general subject of Choses in Action. Starting in the first chapter with a discussion of the various definitions which have been given of the term, and a general statement of the old legal doctrine, and the changes introduced by modern legislation, he proceeds in the second chapter to state the leading principles relating to Rights of Action. The subject of Equitable Assignments is next dealt with, followed by a statement of the Common Law doctrine, both before and after the Statute of 35 Vict. The fifth chapter deals with a number of particular assignments, which possess peculiar features of their own, though controlled to a greater or less extent by the general principles enunciated in the previous part of the volume. Separate chapters are devoted to the transfer of Corporation Debentures, and of Bills of Lading, and the assignment of securities by a creditor to a surety who has paid his debt. The ninth chapter deals with Maintenance and Champerty, the tenth with the exceedingly difficult subject of the Choses in Action of Married Women, and the eleventh and last with the Pleading of Assignments. From this bird's-eye view of the contents, our readers will see the wide range and variety of the topics with which Mr. Kehoe has dealt, and though in a volume of little over 150 pages, it could scarcely be expected that his treatment of them should be exhaustive and complete, we have no hesitation in saying that this little book will be found a valuable help towards the understanding of this comparatively new and undoubtedly difficult branch of law. We may mention that the value of this volume for practical purposes is much enhanced by a useful appendix of Forms and Statutes, and an excellent index.

CORRESPONDENCE.

Division Court Equity—Bills and notes—Bona fide holder.

To the Editor of the CANADA LAW JOURNAL:—

The defendant, in an action of *Harding* v. *Hartney*, in the Fifth Division Court of the county of Renfrew, bought from T. E. W. & Co., apple trees to the amount of $27.00, for which he gave his note, payable to T. E. W. & Co. or bearer. T. E. W. & Co. sold this note to the plaintiff, a broker in Brockville along with other notes to the amount of $1000.00. At the trial the making of the note was admitted, and the defence set up was that T. E. W. & Co. had verbally agreed to attend

CORRESPONDENCE.

to the trees and replace those that had died, also to take half payment in fruit. The defendant paid into court $18.00, as full payment for the proportion of the apple trees that had lived. T. E. W. & Co. had failed to replace the dead ones. The learned judge asked for evidence from plaintiff that the note was taken by him without notice of the facts set up in defence.

The plaintiff thereupon called evidence to prove that the note was bought before maturity for value and contended that where defendant had only shown a partial failure of consideration, the onus of proving notice was thrown on the defendant. Also, that if he did prove notice it would not be a defence, and was proceeding to read authorities on both points, when the Judge stopped him, and would not allow authorities to be read, stating that he wished to get to the bottom of the case. In obedience to the ruling of the Court, the plaintiff was called, and swore that he bought the note *bona fide* without notice, and for good value. The Judge then asked plaintiff what he paid for these notes from T. E. W. & Co. He replied that he bought the whole lot for $800 at a discount, or shave of 20 per cent.; that it was his business, and he considered he had paid as much as the paper was worth.

The Judge then asked plaintiff to compute what he paid for this note sued on, at a shave or discount of 20 per cent., and expressed his intention of giving judgment for that amount. It was contended that the plaintiff was entitled to full amount of note and interest since maturity, at six per cent., and it was proposed to cite authority, but the Judge gave judgment for $21.60, being 80 per cent. of amount of note, interest on that since maturity of note and costs.

The above is a synopsis of a case decided on the 11th March last.

If this is law, all old ideas as to the free transfer of negotiable securities are at an end. The banks had better close their doors.

On the question of the *onus probandi* raised in the above case, I proposed when stopped to cite the following authorities: *Berry* v. *Alderman*, 14 C. B. 95; *Fitch* v. *Jones*, 1 Jur. N. S. 854; *Whittaker* v. *Edmunds*, 1 M. & R. 445; *Mills* v. *Barber*, 1 M. & W. 425; Byles on Bills, pp. 189 *et seq.*, and cases there cited.

As to the question whether a *bona fide* holder of a note for value without notice, can maintain an action for the full amount of note, I deemed the law so well established that no authority was required; however, I was prepared to cite the cases mentioned in Byles on Bills, p. 267 *et seq.*

Now, sir, the judgment of the learned judge above reported, has been explained to me on the ground that it was an equitable one, and that the Division Court Act gives such powers to Division Court Judges. I do not think it does, and if it does, it should, in my humble opinion, be amended.

As to the judgment being an equitable one, I think there can be only one opinion about that, always excepting the opinion of His Honor. The question, to my mind, is simply this—whether it is more equitable to protect an innocent purchaser for value in the practice of a legitimate business, than to protect a careless and not altogether innocent maker of a note such as the one above described. I might mention here that the defendant was a literate man, and signed his own name.

I may be wrong in my views of tbe above judgment. If I am—and I am open to conviction—I shall be glad to be put right by you, sir, or any of the readers of your valuable journal.

I am, yours, &c.,

JAMES CRAIG.

Renfrew, May 4th, 1881.

[We confess, if the case is correctly stated, and at present we must presume it is, that we should have decided the case differently. Neither law nor substantial justice seems to warrant the finding.—ED. L. J.]

To the Editor of THE CANADA LAW JOURNAL.

Married Women.

SIR,—A correspondent signing himself a "Barrister," in the December number of the LAW JOURNAL, refers to the then recent decision of V. C. Malins of *Pike* v. *Fitzgibbon*, as being opposed to the decision of our Court of Appeal in *Lawson* v. *Laidlaw*, 3 App. R. 77, and warns the profession and County Court judges to be

careful about following that decision until the decision of the V. C. was further dealt with by the Court of Appeal. This was proper enough, but one of the judges of the Queen's Bench, in a recent judgment of that court, was somewhat less cautious, I had almost said less courteous, in referring to the decision of our Court of Appeal. He refers to one of the resolutions laid down by the court, in that case, in these terms : "This resolution has, however, received a rude shock in the recent cases of *Pike* v. *Fitzgibbon*, L. R., 14 Ch. Div. 837, and *Flower* v. *Bullen*, 14 Ch. Div. 665, which have gone very far towards removing, if they have not altogether removed, the foundation upon which the *extraordinary construction* put upon the clause in question was built."

The decision in *Pike* v. *Fitzgibbon* has now been reversed by the unanimous decision of the Court of Appeal in England, consisting of James, Brett, and Cotton, L.JJ., holding that a married woman cannot, by her engagement, bind anything but separate estate to which she is entitled at the time when the engagement is entered into, thus affirming the decision in *Lawson* v. *Laidlaw*. Another portion of the same learned judge's judgment is open to criticism. It is to this effect. (45 U.C.R., p. 526). "This resolution still further proves how illusory the remedy at law would be, for the intelligent married woman would take care that the property with reference to which she might be supposed to have contracted would not wait to be charged with a judgment."

Did the learned judge never hear of an intelligent man, married or unmarried, disposing of his property without waiting for the execution, and a little inquiry might have satisfied him that the creditors might be equally powerless in equity. In *Robinson* v. *Pickering*, in which the same V. C. granted an injunction to prevent the trustees of a married woman from parting with the property till the action was heard. The Court of Appeal at once reversed the decision, holding that the general engagements of a married woman, contracted on the credit of her separate property, do not create any charge on that property, and that till the creditor has established his right by a judgment, he cannot prevent the married woman from dealing with her property.

ANOTHER BARRISTER.

FLOTSAM AND JETSAM.

THE LATE LORD BEACONSFIELD.

An overwhelming national calamity in the death of a great statesman dwarfs ordinary occurrences into insignificance. It is said that very early in his wonderful career the late Lord Beaconsfield was in the office of an attorney. We do not care to inquire into the accuracy of this statement, for it cannot be pretended that the law can claim any share in the formation of his character. Rather, if it be true, is it matter for congratulation that his exuberant genius so quickly escaped from the cramping operation of a lawyer's avocations, and the depressing influence of a lawyer's office upon the imagination. It is for us only to recognise in his death the loss of one who e oratory soared far above that of any judge or advocate of his generation, and who in the European Council, where the debate assumed the most difficult form of contentious proceedings, exercised in their highest perfection the art, the skill, and the tact which carry men to the highest pinnacle of forensic fame. To the deceased the Legal Profession owes a great deal as one of the most brilliant romance writers of the age, in whose works the tired pleader has found refreshment and relaxation, and the weary advocate reinvigorated his mind in the intervals of work in preparation for renewed efforts in the dusty arena of courts of justice. Sharing, as so many lawyers do, in the double contest of the Bar and the Senate, they appreciate most thoroughly the severe loss which the country and the world has sustained, and we feel sure that no body of men regrets more profoundly than the Legal Profession the disappearance of Lord Beaconsfield from the scene of his splendid triumphs.—*Law Times.*

In the general grief at the death of Lord Beaconsfield, lawyers will not forget that he entered upon the business of life as a lawyer. Like the rest of the early history of Mr. Disraeli, little is known, with certainty, of his career in the law, except that it was short. He is believed to have been articled to a solicitor in Old Jewry; but what was the name of his principal, and how he came to leave the law, is without even a tradition. His disciples in the legal profession may well have found internal evidence of an acquaintance with legal processes. Mr. Disraeli's statements of the law were always precise and singularly accurate: while he had a remarkable facility for taking in the effect of proposed legislation, however complicated. His appreciation of the legal bearings of political questions was sound; and his presence in the House of Commons at the time of the Bradlaugh incident would probably have saved the House from a ridiculous situation.—*Law Journal.*

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DIARY FOR JUNE.

4. Sat...Easter Term ends.
5. Sun...*Whit Sunday.*
8. Wed...First meeting of Parliament at Ottawa.
12. Sun....*Trinity Sunday.*
13. Mon...County Court Term for York begins.
14. Tues..County Court sitt. (except York) begins.
15. Wed..Magna Charta signed, 1215.
17. Fri.....Burton and Patterson, JJ. Ct. of Appeal, sworn in 1874.
18. Sat....Earl Dalhousie, Gov.-General, 1820. Battle of Waterloo, 1815.
19. Sun...*1st Sunday after Trinity.* County Court Term ends.
20. Mon..Accession of Queen Victoria, 1837.
21. Tues..Galt, J., sworn in C. P., 1869.
23. Thurs. Hudson Bay Co. Territory transferred to Dom., 1870.
26. Sun....*2nd Sunday after Trinity.*
28. Tues...Queen Victoria crowned, 1837.
30. Thurs. Hon. J. B. Robinson, Lt. Gov. of Ontario. P. E. Irvine, Prest. of P. of Canada.

TORONTO, JUNE 1, 1881.

THE Chief Justice of the Supreme Court, Hon. W. J. Ritchie, has been knighted. This dignity is now, we presume, attendant upon this office as it is to certain high judicial positions in England.

WE are glad to see that the dignity of a Companion of the Order of St. Michael and St George has been conferred on Mr. Alpheus Todd, Librarian of the Parliament of Canada, —an old friend and an occasional contributor to this journal. The degree of LL.D. has also been conferred upon him by Queen's College. These honors are worthily bestowed upon one so useful in his generation, and of such high literary attainments.

WE publish in this number of the LAW JOURNAL the report of the Minister of Justice, in pursuance of which the Public Streams Bill, passed last session, has been disallowed by the Governor-General in Council We also publish the first part of an article reviewing the precedents and authorities for such an exercise of the prerogative of veto, which want of space has reluctantly compelled us to divide into two portions.

IN our last number (p. 197), we referred to a case of *McCutcheon* v. *Creswicke* (which should have been cited as *McCracken* v. *Creswicke*) decided by Judge Ardagh, in which he held that a claim on a promissory note for less than $100, but which with interest exceeded that amount, was recoverable in the Division Court. A motion for a prohibition has since been refused by HAGARTY C. J., and the ruling of the Court below sustained.

THE change in the Cabinet at Ottawa makes Sir Alexander Campbell Minister of Justice. We are glad to see a member of the Ontario Bar in this position. It is some years since Sir Alexander was in the active practice of his profession, but his great administrative capacity, his extensive knowledge of constitutional and statute law, combined with the fact that he is a highminded courteous gentleman, will render his reign in his new Department very satisfactory to the public.

MR. JUSTICE GROVE, at a public dinner in England, revived a saying of Lord Bacon's, to the effect that a "talking judge was an ill-tuned cymbal." Our namesake in England quotes the passage in full, as follows:—

"Patience and gravity of bearing is an essential part of justice, and an over-speaking

judge is no well-tuned cymbal. It is no grace to a judge first to find that which he might have heard in due time from the bar, or to show quickness of conceit in cutting off evidence or counsel too short, or to prevent information by questions, though pertinent. The parts of a judge in hearing are four—to direct the evidence; to moderate length, repetition, or impertinency of speech; to recapitulate, select, and collate the material points of that which hath been said; and to give the rule or sentence. Whatsoever is above these is too much, and proceedeth either of glory and willingness to speak, or of impatience to hear, or of shortness of memory, or of want of a stayed and equal attention."

A divergence of opinion has occurred in the English Courts, as to copyright of articles published in daily papers. The case relied on for the plaintiff in the last case (*Walker* v. *Howe*), who sought to restrain the republication of such an article, was *Cox* v. *Land and Water Journal*, L. R. 9 Ex. Div. 324. The author of the article was not a party: but, in the plaintiff's affidavit, it was stated that he had been paid by them for his literary services. The Master of the Rolls (we quote from the *Law Journal* Notes of Cases) said he did not agree with the above case, and declined to follow it; and held that the newspaper was a "periodical work" within the meaning of section 18 of the Copyright Act, 1842; and, as it was not registered under the Act, the proprietors could not sue in respect of a piracy. If there were any other copyright in the article, that belonged to the author, and, as the plaintiffs did not sufficiently show they were entitled to the whole copyright, no injunction could be granted on that ground. He therefore refused the motion, with costs.

IF there is one thing more than another that strikes the mind of the Anglo-Saxon lawyer as to the pervadence of his race, it is to receive from all quarters of the globe legal periodicals treating of law, founded on cases decided upon the common law of England. We have Law Journals from England, Ireland, the cities of North America on the Atlantic seaboard, the central points of the continent, and the Pacific coast, from New Zealand and Australia, and so onward. There is a strong family likeness among them all, while they differ as much as members of a family generally do.

These reflections are caused by the appearance on our table of the *Australian Law Times*, now in the second year of its existence. It is, like ourselves, a fortnightly publication, and although containing considerably less matter, is published at the much more comfortable figure of two guineas per annum. We congratulate our cousin upon the vigor he displays, and wish him every success in his enterprise.

The article of most interest in the number before us treats of the law of Banking, consisting in the main of a review of a book on the subject by a Mr. Hamilton, which we could fancy it might be well to get for our Library at Osgoode Hall. It appears that "certain serious divergences of opinion have arisen, and are likely to arise, between the supreme courts of the Australian colonies—divergences which would not long exist if there were an Australian federal court of appeal. Such a court could deal with questions of the kind to which we have alluded much more effectively than the Privy Council; for the practice of banking in Australia and New Zealand is in many respects different from that in England, and some comparatively ignored points of the English law receive here a peculiar prominence. As Mr. Hamilton says in his preface, when modestly introducing his book,—It is believed that there is a complaint, not uncommon amongst bankers and others, that English books when consulted are often found to be perplexing and at times wholly inapplicable and unpractical. This may probably be attributed to the fact that such works apply

to a mode of banking which does not prevail in Australia and New Zealand, where the system in operation is a modification or adaptation of the Scotch, and differs in many striking features from that which is practised in London and generally throughout England. Several instances are given of the variance in practice. Thus, it would appear that in England a banker does not pay a 'stale' cheque —a cheque which is presented a long time after being drawn—without enquiries or instructions; whereas in Australia payment is never refused unless the term prescribed by the Statute of Limitations has run (p. 83). Again, it seems to be the habit in Australia to hand cheques to the ledger-keeper, who marks them for payment before they are paid by the teller; and the important point has been mooted, whether this marking does not operate as an acceptance by the bank and bind it to pay the cheque (p. 68). Moreover, when advances are made, the English practice is to open a 'loan account;' in Australia, the system of 'overdrafts' is most commonly adopted (p. 109). The customer has the advantage in the case of an overdraft of having to pay interest on the sum actually withdrawn only. 'Cash credits" are very popular in the colonies, but are unknown almost in England (p. 116). It is interesting to learn that both in Victoria and in New South Wales a partner in a squatting firm can bind the firm by drawing bills and borrowing money (p. 36). An important point, on which English cases give no light, has been decided by the South Australian Court, which has found that there is a custom in Australia to treat interest as chargeable on overdrafts without any express agreement to pay it (p. 113). And the law relating to branch banks has assumed peculiar importance here; probably, as Mr. Hamilton says, because in England the functions of branch banks are to so great an extent discharged by private bankers carrying on business in partnership (p. 240)."

Now we in Canada can probably see the force of the latter portion of these remarks much better than the orthodox changers of money of Lombard St. As to the difficulties arising from the want of a Federal Court of Appeal, we shall expect, when the annual motion comes up to do away with our Supreme Court, to see the article quoted giving a text to one of those who would seek to save its life.

WHILE the position of our Canadian judges is probably not altogether what it should be, they have reason to congratulate themselves that they are not exposed to the petty annoyances which some of their brethren in the United States are compelled to suffer at the hands of interfering legislators. An Act has recently been passed by the Michigan Legislature requiring the judges of the Supreme Court "to prepare and file a syllabus to each and every opinion by them delivered." This certainly seems a sufficiently impertinent and unwarranted interference with the long-established distinction between the duties of a judge and those of a reporter, but a still more glaring example of what the *Central Law Journal* calls "the indecent methods taken by legislative bodies to get the greatest possible amount of work," is that Californian statute which withholds the salary of any judge who happens to be behind his docket, no matter what the nature of the cases on it may be. On attempts such as these to lower the dignity and add unreasonably to the toils of a judge's life, we heartily endorse the trenchant comments of the journal from which we have already quoted:—

"We know that poorly reported decisions and judicial sloth are grave evils, and we sympathize with any rational attempt to remedy them. But we do not believe that any permanent good purpose can be subserved by attempts on the part of the law-makers to treat benches of reverend judges as if they were gangs of irresponsible and dishonest employees. A good article of professional service must be well paid for, the world over. If good, accurate, faithful reporting is a desideratum, let the legislature pay well, and there will be little difficulty in getting the work well done. If dockets get behind, in many instances more judges and larger salaries will be found an effectual remedy."

Hon. James McDonald, Minister of Justice succeeds Sir William Young as Chief Justice of Nova Scotia.

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THE NEW VICE-CHANCELLOR.

The appointment of Mr. Thomas Ferguson, Q.C., to the vacant seat on the Chancery Bench has been well received by the profession. He is known very favorably to his brethren at the Bar, and we join with them in congratulating him on his promotion. Though, perhaps, best known to the public up to the present time on circuit, and as a successful advocate before a jury, he is known at Osgoode Hall as a sound lawyer, and will prove a painstaking, industrious, and, we are sure, a very satisfactory judge. Mr. Ferguson will bring to bear on his work a large fund of shrewd common sense; and, having knocked about the world a good deal, has a familiarity with the practical details of work-a-day life, which will be of great use in the position in which he has been placed.

Mr. Ferguson was called to the Bar in Trinity Term, 1862, having studied with the late Henry Eccles, one of the most gifted men that ever entered the ranks of our profession. In March, 1876, Mr. Ferguson received his silk at the same time as the present Chief of his Court. He has, during the past few years, rapidly come to the front as a counsel; and the firm of which he was the head have enjoyed a large share of the legal business of the country.

ANNOTATED EDITIONS OF THE JUDICATURE ACT.

The inevitable necessity that a much legislated for profession should read, mark, learn, and inwardly digest the Judicature Act is gradually forcing itself upon their consideration. It is gratifying to know, however, that learned annotators are doing their best to make the dose as agreeable as possible.

The body of the work prepared by Messrs. Taylor and Ewart, has, through the courtesy of their enterprising publishers, Messrs. Carswell & Co., just been placed in our hands. The sheets of Mr. Maclennan's book have also been sent to us for perusal. Both volumes will be ready for distribution in a few days, and as we presume all sensible people will buy both, we can well leave any comparison as to their respective merits to a critical examination by a critical profession in the long vacation. We cannot pretend in the short time that has been given us to do more than speak of them from a very cursory glance before we go to press.

The alterations made in the nature of the pleadings, and the steps to be taken in an action, are of course fully noticed, explained, and compared with the former practice; and necessarily much of the information is the same in both volumes.

Mr. Maclennan's work is a compact, well arranged volume, though not so bulky as that of Messrs. Taylor and Ewart. In it he treats fully of the new and extensive rules, in regard to the joinder of cases of action, and joinder of parties and pleadings. Some of the most important features in the act must be carried out by means of procedure which is entirely new to the Ontario practitioner, and it is to these that the learned author seems to have devoted special attention. Amongst the provisions for facilitating a plaintiff, we might mention those rules which enable him, where he has specially indorsed his writ, to call upon the defendant to shew cause why judgment should not be signed forthwith before any pleadings have been delivered. Amongst the provisions of benefit to a defendant are those which enable him by counter claim to set up in answer to the plaintiff's claim, any cross demands that he may have, whether liquidated or not, subject only to the discretion of the Court to exclude the counter claim, if it cannot be conveniently disposed of in the action. Again, there are the rules which, to avoid multiplicity of suits, enable a defendant to bring into the action third parties against whom he may have a

claim for indemnity or otherwise, but whom the plaintiff has not made or could not make parties. All these subjects seen to be fully explained, and, so far as we can see, illustrated by references to the English cases. The decisions of our own courts have not been left unnoticed in dealing with practice analogous to that now existing, but all that can be considered as authorities would seem to have been referred to. One very convenient addition which we notice is a Time-table, showing at a glance the times for taking the different steps in an action. The book is made complete as a treatise on the practice of the Courts by the addition of the orders of the Court of Appeal, and the index seems to be all that can be desired.

The edition by Messrs. Taylor & Ewart will, with the appendix, &c., be a well printed volume of some 800 pages. The notes on all questions of practice seem very complete, such, for example, as those on the subject of the powers of the Courts to grant relief to defendants under sec. 16, ss. 4; also as to counter claims, the authors giving a *resumè* of the old law and the cases under the corresponding section in England. This covers eleven pages of closely printed matter. Again, under section 45 the reader is given *in extenso* the sections of the C. L. P. Act and other enactments still in force, with appropriate explanatory notes, thus giving a comprehensive view of the subject. In addition to the Act proper, the Chancery Act, the Attorneys' Act, and the English Trustee Act of 1850 are reproduced, with notes bearing on the general subject of the work—also the general orders of the Court of Chancery remaining in force notwithstanding the passage of the Judicature Act, fully noted; and in connection with this we notice a feature which cannot but be of much practical utility, especially to beginners, a detailed account of the various proceedings in a mortgage suit, amounting in fact to a manual on the subject.

The number of cases referred to in both books is very large, and though this is in itself by no means a proof of the value of the work done, it is evident that the compilations before us show the great industry and research of their authors. As to their ability it is not necessary for us to speak.

DOMINION CONTROL OVER PROVINCIAL LEGISLATION.

The Order in Council coutained in the *Canada Gazette* for May 21st ult., disallowing the "Act for protecting the public interest in rivers, streams, and creeks," being chapter 11 of the Ontario acts for last session, makes the question as to the measure of control that can be constitutionally exercised by the Governor-General in Council over Provincial legislation, of peculiar interest at the present time. The importance attaching to the form in which the constitutional practice in this matter is destined ultimately to mould itself, can scarcely be denied.

The chief sources of authoritative information in regard to it are to be found in two very lengthy returns to the Dominion Parliament, one of which is contained in Can. Sess. Papers, 1870, No. 35, and the other in Can. Sess. Papers, 1877, No. 89.

It is not, however, proposed in this place to refer at all to the question, how far the Governor-General, in determining according to his discretion (under B. N. A., sec. 90), whether bills passed by the Provincial legislatures shall be disallowed, or not, fulfils this function as an Imperial officer, and subject to instructions received from the Secretary of State; or whether he is bound to be guided in all cases by the advice of his ministers, who are themselves responsible to the Dominion House of Commons. On this important point there has been much correspondence between the Imperial and the Dominion Government, but it appears to remain still without authoritative decision (see Todd's

Parliamentary Government in the British Colonies, pp. 331-345).

Assuming that in the exercise of this prerogative, the Governor-General will always, as in the case of the Public Streams Bill, consider it his duty to act by and with the advice of his Privy Council, it remains to consider what precedents and authoritative documents indicate as to the limits of the constitutional exercise of the prerogative of disallowance.

Mr. Todd, in the standard work above referred to, cites a number of precedents to prove that under the B. N. A. Act the control of the Crown over the Provinces of the Dominion is now exercised, not directly by Imperial authority, but indirectly through the instrumentality of the Dominion Parliament, and that it is incumbent upon the Governor-General in Council, in the exercise of his constitutional supremacy, to respect the rights of the Provinces in matters of local legislation, so far as the same are defined by the B. N. A. Act.

It is the second portion of this proposition of Mr. Todd's that it is proposed to examine.

Before the time for disallowance (one year: B. N. A. Act, sec. 90) of acts passed in the first session of the various Provincial Legislatures of the new Confederation had expired, a correspondence took place between the Imperial and Dominion Governments on the question of the exercise of this prerogative.

In a Report dated June 8, 1868 (Can Sess. Papers, 1870, No. 35), Sir John Macdonald, the then Minister of Justice, says :—

"The same powers of disallowance as have always belonged to the Imperial Government, with respect to the acts passed by Colonial Legislatures, have been conferred by the Union Act on the Government of Canada.....Under the present constitution of Canada, the general Government will be called upon to consider the propriety of allowance or disallowance of Provincial Acts much more frequently than Her Majesty's Government has been with respect to Colonial enactments.

In deciding whether any Act of Provincial Legislatures should be disallowed or sanctioned, the Government must not only consider whether it affects the interest of the whole Dominion or not, but also whether it be unconstitutional: whether it exceeds the jurisdiction conferred on Local Legislatures, and in cases where the jurisdiction is concurrent, whether it clashes with the legislation of the general Parliament.

As it is of importance that the course of local legislation should be interfered with as little as possible, and the power of disallowance exercised with great caution, and only in cases where the law and *general interests of the Dominion imperatively demands it*, the undersigned recommends that the following course be pursued :—

He, then, proceeds to suggest that all provincial Acts be referred to the Minister of Justice for his report, and that he report separately on those Acts which he may consider :—

1. As being altogether illegal or unconstitutional.

2. As illegal or unconstitutionl in part.

3. In cases of concurrent jurisdiction as clashing with the legislation of the general Parliament.

4. As affecting the interests of the Dominion generally. And also that in such report he give his reasons for his opinions.

This report was approved by the committee of the Privy Council and the Govenor-General, and copies were sent to the several Provincial Govenors.

The Minister of Justice on July 1, 1868, proceeded to report on various Acts passed in the first session of the legislature of Ontario as objectionable, because *ultra vires*.

This report was forwarded by Sir John Young, the Governor-General, to the Secretary of State for the Colonies, at that time Earl Granville, asking him to consider it and take the opinion of the law officers of the Crown.

By a second despatch of the same date the Governor-General points out "the probability of misapprehension and future diffi-

culty if a remedy be not speedily devised and applied for the prevention of uncertainty and possible conflict between rival authorities." He then asks for instructions as to the allowance or disallowance of Provincial Acts.

In the reply of Earl Granville, dated May 8, 1869,—which, however, chiefly concerns the main subject of enquiry by the Governor-General, namely, how far he was to act as an Imperial officer in regard to the disallowance of Provincial acts,—illegality or unconstitutionality are the only grounds alluded to as requiring the disallowance of such acts.

The Parliamentary Returns, indeed, show that by far the greater number of Provincial Acts which have been declared objectionable by the Governor-General in council have been so declared, because they or some of their provisions were not within the jurisdiction of the legislature, but infringed on the domain of Parliament under the B. N. A. Act. This ground of objection seems conceded on all sides, and there is, therefore, no object in dwelling upon it. There is another somewhat similar ground for interference as to which there also appears to be no question, viz., to avoid any inconvenient results, which might arise from a conflict as between the powers conferred on the Dominion Parliament by the B. N. A. Act (sec. 91), and those conferred on the Local Legislatures, in cases where there is, or might appear to be, concurrent jurisdiction. (As to this, see per Ritchie, J., in *Severn* v. *The Queen*, 2 S. C. R., 102, and per Strong, J., ib. p. 109, and Fournier, J., ib. p. 119).

But the returns show clearly that such have not been the only grounds on which the Dominion Government has been in the habit of interfering with Provincial Legislation.

Before alluding to these other grounds, however, it may be observed that the care with which this prerogative should be exercised is insisted on on all sides. The passage quoted above from the Report of the Minister of Justice is an illustration of this. Mr. Todd (p. 343) also points out that in deciding upon the validity or expediency of provincial enactments, the Governor-General in council has no arbitrary discretion, but that (p. 367) "the rights of local self-government heretofore conceded to the several provinces of the Dominion are not, in anywise, impaired by their having entered into a federal compact," and that no infringment upon these rights which would be at variance with constitutional usage, or with the liberty of action previously enjoyed by these provinces when under the direct control of the Imperial Government, would be justifiable on the part of the Dominion Executive. There are also many *obiter dicta* of our judges to the same point. Thus in *Severn* v. *The Queen*, 2 S.C.R. 96 (1878) Sir William Richards said: "Under our system of government, the disallowing of statutes passed by a Local Legislature after due deliberation, asserting a right to exercise powers which they claim to possess under the B. N. A. Act, will always be considered a harsh exercise of power, unless in cases of great and manifest necessity, or where the Act is so clearly beyond the powers of the Local Legislature that the propriety of interfering would at once be recognized."

So in the same case Fournier, J., says on p. 119 of the same volume:—

"No doubt this extraordinary prerogative exists, *and could even be applied to a law over which the Provincial Legislature had complete jurisdiction.* But it is precisely on account of its extraordinary and exceptional character that the exercise of this prerogative will always be a delicate matter. It will always be very difficult for the Federal Government to substitute its opinion instead of that of the Legislative Assemblies, in regard to matters within their province, without exposing themselves to be reproached with threatening the independence of the Provinces."

In *Leprohon* v. *The City of Ottawa*, 40 U. C. R. 490, Harrison C. J. says:—

"The power of the Governor-General in

Council to disallow a Provincial Act, is as absolute as the power of the Queen to disallow a Dominion Act; and it is in each case to be the result of the exercise of a sound discretion, for which exercise of discretion the executive council for the time being is in either case to be responsible as for other Acts of executive administration."

But, as Mr. Todd remarks (p. 363), though for the most part, this power has been resorted to only in cases wherein the Provincial Legislatures have passed Acts which were unconstitutional, or beyond their legal competency to enact, yet—

"*It has been sometimes invoked, in respect to Acts which contained provisions that were deemed to be contrary to sound principles of legislation, and therefore likely to prove injurious to the interests or welfare of the Dominion.*" (See ib. p. 366.)

It is proposed here to review, briefly, some of the precedents shown in the Parliamentary Returns, which go to justify this last statement.

It is worth while to observe, in the first place, that the deprivation of innocent parties of vested interests by retroactive enactments is mentioned by Draper, C. J., in Re *Goodhue*, 19 Gr. 366 (1872) as affording specially fitting grounds for the interference of the Governor-General in Council. In this case, it will be remembered, the provisions of a certain will were overridden by a private act of the Local Legislature, and one of the trustees named under the will refusing to carry out the provisions of the Act, the validity of the Act (amongst other questions) came before the Court on petition presented by persons interested under the will. At p. 384, Draper, C. J., says:—

"In regard to the absence of a second chamber, it may be further observed, so far at least as estate or private bills are concerned, that as such bills involve ordinarily no mere party political considerations, all those whose interests are or may be touched have a right, in the first place, to expect a careful examination of their contents on the part of the Provincial Executive, and a withholding of the Royal assent if it is found that the promoters of the bill are seeking advantages at the expense of others whose interests are as well grounded as their own. *And further, if from oversight or any other cause, provisions should be inserted of an objectionable character, such as the deprivation of innocent parties of actual or even possible interests, by retroactive legislation, such bills are subject to the consideration of the Governor-General, who, as the representative of the Sovereign, is entrusted with authority, to which a corresponding duty attaches, to disallow any law contrary to reason or to natural justice and equity.* So that, while our legislation must unavoidably originate in the single chamber, and can only be openly discussed there, and once adopted there cannot be revised or amended by any other authority, it does not become law until the Lieut.-Governor announces his assent, after which it is subject to disallowance by the Governor-General."

But he concedes that the Act (p. 386) was within the defined powers of the Local Legislature, for it was of a local and personal nature, and related to property and civil right. Nevertheless, he declares in the above passage, that it would have been right and proper for the Governor-General in Council to have disallowed it.

The first precedent immediately bearing on the main subject of this article appears to be that of an Act passed by the Quebec Legislature, in 1868, "To incorporate the St. Louis Hydraulic Company," which was reserved by the Lieutenant-Governor for the assent of the Governor-General. The Company was proposed to be incorporated for the purpose of creating a water-power, by the erection of a dam across the River St. Lawrence. The Minister of Justice, on January 11th, 1869, (Can. Sess. Papers, 1870, No. 35, p. 29), reported as to this Act that,

"As it is a matter of national importance to preserve the navigation of the greatest river in the Dominion from being obstructed, and as it was the opinion of some professional men that the erection of the proposed dam would not only injuriously affect the navigation of the river, *but cause great injury to property on or near its banks*," he had obtained a report from the Chief Engineer of the Department of Pub-

lic Works on the subject. The report then goes on to say:

"The whole tenor of this report shows, that Mr. Page apprehends that the projected work would cause serious charges of a prejudicial character in the navigation of the river, and might be *the means of injuring private property* to an extent which cannot now be calculated. "After such a report, *and without reference to the constitutionality of the Act*, the undersigned is of opinion that it would not be safe, in the public interests, to allow the Bill to become Law."

This report was approved by the Privy Council and Governor-General on July 10, 1868 (ib. p. 28).

This precedent appears to be in point only so far as it refers to injury to private property that would be done if the Act went into force as one reason for its disallowance, thus putting a circumscribed interpretation on B. N. A. sec. 92, sub-s. 13, which gives the Provincial Legislatures the power of exclusively making laws as to "Property and Civil Rights in the Province." That, indeed, this subsection must be understood in a limited sense is insisted on in the judgments in the Supreme Court in *Valin* v. *Langlois*, 3 S.C. 1.

(To be Continued.)

THE JUDICATURE ACT.

We continue the criticisms referred to in a previous page (p. 178), holding responsible therefor the advance sheets of Messrs. Taylor and Ewart's forthcoming work.

ORDER XVII.—1 (*b*). What is the use of filing a copy of the writ? Where the writ was issued a copy was probably filed (see O. III. r. 15), but the word "may" in this latter rule has been substituted for "shall" in the corresponding English rule. The words "if not already filed," should have been inserted as in rule 2 of same order (XVII).

O. XXI. "As soon as either party *has joined issue* * * * * the pleadings shall be deemed to be closed *without any joinder*." etc.

O. XXIV. 5. The old and now inapplicable phraseology crops up here. There is no such thing as a *plea* under the new practice. It is a *statement* of defence: see O. XV. r. 1 (*a*).

Who is the Registrar referred to in O. LVI. r. 3? It cannot mean the Registrar of the Court of Chancery, for he is the Accountant (see O. LVI. r. 6), and it could hardly be intended that the same officer should draw cheques and countersign them.

O. II. r. 5 requires that "every writ of summons, *and every other writ* . . . shall require the defendant to appear thereto in ten days after service." Subpœnas and *fi. fas.* are writs.

Under O. XXXVI. r. 8 any party may apply for such order as he may upon any admissions in the pleadings or the examination of the other party be entitled to. "Any such application may be made by motion as soon as the right of the party applying *to* the relief claimed *has appeared from the pleadings*.

Under O. XXXV. r. 8 "on the argument of an order to shew cause, the counsel of the party supporting the application shall begin, and shall state fully the grounds of the application, and shall have the reply." This will necessitate three speeches from counsel applying for a new trial, and the Court will have to hear the first address repeated a second time before hearing the other side.

O. XLVI. r. 4. Section 17 should be section 19.

O. VII. r. 1 (*e*), is an extraordinary provision, inasmuch as it provides that no matter where a contract is made, or where the plaintiff or defendant resides, an action may be brought in Ontario if the defendant has assets to the value of $200 within the jurisdiction.

By section 43 appeals to the Supreme Court are limited in various ways. Is this *intra* or *ultra vires*? The B. N. A. Act, sec. 101, provides that the Parliament of Canada may provide for the constitution, maintenance, and organization of a General Court of Appeal for Canada." By the Dominion Statute, 38 Vict., c. 11, the Supreme Court was erected, and sec. 17 provides that "subject to the limitations and provisions hereinafter made, an appeal shall lie to the Supreme Court from *all* final judgments of the highest court of final resort.....now or hereafter established in any province of Canada." The two acts assume to deal with the same subject, and are in conflict.

Form No. 125 is of an order to produce, to be made *in Chambers*. It can be obtained on præcipe. See O. XXVII. r. 4.

Form No. 138, an order made to examine judgment debtor in *Chambers*. Is there need for an order at all? O. XLI. r. 1.

NOTES OF RECENT DECISIONS.

CONTRACT.

An interesting case to mercantile men is that of *Lambe* v. *Hartlaub, et al.*, reported in the *Legal News* (p. 138). The action was to recover the value of a large quantity of teas sold by plaintiff to defendants (not, by the way, "an action to rescind a sale of, &c.," as stated by the reporter). The sale was made in Toronto, in February, 1880, through a Montreal broker, at a certain price, duty paid, delivered in Toronto, the terms of payment being cash on delivery. The goods were shipped to the defendants by G. T. R. Co., duty paid, but were on their arrival in Montreal seized by the Customs' authorities, on the allegation that they were fraudulently entered as a direct importation from Japan; and that thus a less duty was paid than was properly chargeable.

The Government being subsequently satisfied that the goods were properly entered, released them on 6th April, 1880. The defendants sought to avoid the contract, or a reduction in the price, on the ground that owing to the seizure they were unable to carry out a sale they had made on the faith of the purchase from plaintiff, whereby they lost their profit, and had become liable to their vendee. The Court very properly held that the plaintiff must succeed, and that the rights of the defendants, if any, were against the Customs' authorities, and not against the plaintiff, who had made no default.

BANKERS AND GUARANTEE COMPANIES.

The *Legal News* also reports (p. 147) the case *La Banque Nationale* v. *Lesperance, et al.*, which brings up the liability of a surety for a bank official under rather peculiar circumstances. The facts of the case (fully set out in the report) are shortly as follows:—

The Teller of a bank endorsed on a parcel of bank notes the amount which it was supposed to contain. It was subsequently discovered that the parcel was $6,300 short, and it was ascertained that a deficiency of the same amount existed in the Teller's accounts, and had been during several years skilfully covered up and concealed from the knowledge of the authorities of the bank, who had made the usual inspections.

Upon an action brought by the bank on a policy of the defendant, guaranteeing the fidelity of the Teller, and against the defaulter himself, it was *held* by JOHNSON, J. of the Superior Court, that the Guarantee Company was liable for the deficiency, but only to the extent which occurred after the contract was made.

NUISANCE BY LETTING OFF FIREWORKS.

In *Coombe and Wife* v. *Moore*, the defendant, being an American, on July 4 last, celebrated the anniversary of the declaration of the independence of the United States of America, and invited several friends to his house on the occasion. Part of the entertainment which he had prepared for his guests was a display of fireworks. July 4 was a Sunday; and, when the Sunday had passed, between 12 and 1 o'clock on the morning of the 5th, some fireworks were let off in the defendant's garden. The reports of the fireworks were described by witnesses as having a sound like an explosion; and evidence was given that twelve or fourteen rockets had been let off on the occasion in question. The plaintiffs were aroused by the first report, and Mr. Coombe went down stairs, followed by Mrs. Coombe. While he was in his garden, he saw four or five rockets, the cases and sticks of which fell into his garden. Mrs. Coombe was much alarmed, an attack of hysteria supervened, which was followed by neuralgia. Under the doctor's advice, she went by sea for a trip to Ireland, which improved, though it did not quite restore, her health. The judge submitted two questions to the jury—namely, whether the acts of the defendant were reasonably calculated to interfere with the health of people living in the neighborhood, having regard to people's ordinary habits of life; and whether the injury to the health of Mrs. Coombe was the consequence of the acts of the defendant; and he directed them that the defendant would not be liable for an interference with the comfort of the plaintiffs unless their comfort was so far interfered with as to affect health.—The jury answered the questions which had been left to them, in favor of the plaintiffs, and assessed the damages at one farthing.

We confess to feeling some sympathy for

Mrs. Coombe. She did not know the extent to which American patriotism can go.

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH.

IN BANCO—MAY 16.

CROWE V. STEEPER.

MUNICIPAL LAW.

To change the Common Law by-laws must be distinct in their language. A by-law enacted that certain animals (named) and other breachy cattle should not run at large, and fixed the height of fences. *Held*, that as the by-law did not permit the running of cattle at large by enacting that some should not, it was held that the plaintiff was liable at Common Law for injury sustained, no matter what the height of the fences fixed by the by-law might have been.

Robinson, Q.C., and *Scane* for the plaintiff.

Bethune, Q.C., *contra*.

CHANCERY.

Blake, V. C.] [May 13.

GILCHRIST V. WILEY.

Demurrer—Equitable garnishment.

The plaintiff, who had recovered judgment against the defendant Wiley, filed a bill alleging that Wiley, being the owner of lands subject to a mortgage, conspired with his co-defendant, whereby a second mortgage was executed by Wiley to one A., who paid the money to the co-defendant, which was held by him as agent or trustee for Wiley. The lands were subsequently sold in a suit by the first mortgagee, and realized sufficient to pay the two mortgages only. The plaintiff proved his claim in that suit in the Master's office, but received nothing. He alleged that he had been led to believe that the mortgage by Wiley to A. was *bona fide*, but had ascertained that such was not the fact; and prayed that the co-defendant might be ordered to pay over the amount paid out of the proceeds of the lands to satisfy the mortgage in favor of A.

Held, that the bill was in effect one to garnish the money due to Wiley in the hands of his co-defendant, and under the authority of *Horsley* v. *Cox*, L. R. 4 Chy., 92, and *St. Michael's College* v. *Merrick*, 1 App. R. 520; 26 Grant, 216, could not be maintained.

J. Reeve, for plaintiff.

Moss, for defendant Wilson.

Spragge, C.*] [May 21.

SANSON V. NORTHERN RAILWAY COMPANY.

Nuisance—Injunction—Acquiescence.

The plaintiff was owner of a steam vessel plying on Lake Couchiching, and accustomed to run into the River Severn, where it leaves the lake, and to lie in a basin beside a wharf at Washago. The defendants, in extending their line of railway, constructed a bridge across the river which completely obstructed the entrance, and caused special damage to the plaintiff, who was obliged to moor his boat in a basin on the lake side of the bridge, which was somewhat too small for its intended purposes. Some correspondence took place while the bridge was being built, between the plaintiff personally and through his solicitor, and the defendants' general manager, in the nature of protests, but the bridge had been in use for several years without action on the part of the plaintiff, when the bill was filed praying that it might be declared a nuisance, and that the defendants might be ordered to abate it.

Held, that by the delay in taking action, and otherwise, there had been unequivocal acquiescence in the defendants' action, and the bill was therefore dismissed with costs.

D. McCarthy, Q.C., and *Pepler*, for plaintiff.

Walter Cassels and *Boulton* for defendants.

Spragge, C.] [May 21.

NELLES V. WHITE AND O'NEIL.

Tax sale—Assessment, validity of—Description—Certificate of sale, effect of—Possession fraudulently obtained.

A parcel of land called Lot One in one survey and Lot Four in another was assessed variously as "1, 4," "1 and 4," "1 and part 4," "part 1 and 4," which, however, did not mislead.

* The following cases were heard by the present Chief Justice of Ontario, whilst Chancellor.

Held, that though these irregularities indicated want of care and accuracy in the officers of the municipality, they did not invalidate the assessment, as the land was sufficiently pointed out. *McKay* v. *Chrysler*, 3 S. C. R. 474 distinguished. *Held*, also, that the words "be the same more or less" following the description of the quantity of the land improperly inserted in the Sheriff's deed might be rejected as surplusage.

The Sheriff's certificate of the sale is made for the purpose of giving the purchaser certain rights in order to the protection of the property until it is redeemed or becomes his absolutely, and forms no part of his title, and its absence does not invalidate the Sheriff's deed.

The plaintiff was assignee in insolvency of H., who bought from the purchaser at the Sheriff's sale. H. leased to and put T. in possession, and had some small buildings put on the land. Subsequently the defendant, O'Neil, made untrue representations to T., which induced him to quit possession; whereupon O. went in and occupied, claiming under defendant W., who, he alleged, had an interest in the land. W., by his answer, adopted O.'s possession, and claimed under conveyance from the Crown, but failed to prove his title.

Held, following *Doe Johnson* v. *Baytum*, 5 A. & E. 188, that the possession so fraudulently obtained by O. did not entitle him to put the plaintiff on proof of his title.

Boyd, Q. C., and *Kew*, for plaintiff.

S. White and *G. C. Gibbons*, for defendant.

Spragge C.] [May 21.

WATSON v. DOUSER, *et al.*

Mortgage—Priority—Unpaid purchase money—Incumbrance.

C., being the equitable owner of land, contracted by writing (registered) to sell to the defendant on 13th February, 1877. Part of the purchase money was paid down. C. obtained an order on 17th April, 1878 vesting the land in him—there were two mortgages on the registry prior to one in favor of the Loan Company. On the 17th May the defendant gave an order on the Loan Company to pay the proceeds of the loan to their local agent, who was informed by one J., a solicitor who had control of the two prior mortgages, that they were paid off and that he would get them discharged. Thereupon the agent paid C. the balance of his unpaid purchase money, and C. on 25th May, 1878, conveyed to defendant. The Loan Company's mortgage was dated the 15th May and registered the 25th May.

Held, on appeal from the Master affirming his report, that the Loan Company could not stand in C.'s place and claim priority in respect of his lien for unpaid purchase money over the prior mortgagees, following *Imperial L. & S. Co.* v. *O'Sullivan* 8 Pr. R. 162.

The Loan Company's mortgage contained this clause, "and it is hereby declared that in case the Company satisfies any charge on the lands the amount paid shall be payable forthwith with interest, and in default the power of sale hereby given shall be exercisable, and in the event of the money hereby advanced or any part thereof being applied to the payment of any charge or incumbrance, the Company shall stand in the position and be entitled to all the equities of the person or persons so paid off."

Held, that this provision could not effect prior mortgagees who were no parties to it, and *quære* whether it would apply to the discharge of unpaid purchase money which does not constitute charge or incumbrance in the proper meaning of those terms.

Boyd, Q. C. for plaintiff.

Moss, for the Loan Company.

Spragge C.] [May 21.

SMITH v. THE MERCHANT'S BANK.

Insolvency—Bills of Lading—Warehouseman—Warehouse receipts.

By the Act 34 Vict. ch. 5 (D) it is not necessary to the validity of the claim of a bank under a warehouse receipt, that the receipt should reach the hands of the bank by endorsement: the bank itself may make the deposit and receive from the warehouseman the receipt.

A bank had discounted for a trading firm, on the understanding that a bill of lading of a quantity of coal shipped to the firm would be transferred to the bank as collateral security, which was accordingly done, and the bank secured from one of the partners, who was a wharfinger and warehouseman, his receipt for

the coal as having been deposited by the bank. The partnership having become insolvent, the assignee sought to hold the coal as the goods of the insolvent, and filed a bill impeaching the validity of the receipt. It appeared that the insolvents had mixed the coal with other coal, and had sold some of it, and that all the coal in the premises was not sufficient to answer the quantity comprised in the receipt. Under these circumstances it was *held*, that the bank had a right as against the assignee—as it would have had against the insolvents—to hold all the coal in store of the description named in the receipt, and also to payment out of the money, the proceeds of the coal which had been sold.

D. McCarthy, Q.C., and *Kingsford*, for plaintiff.

C. Robinson, Q.C., and *J. F. Smith*, for defendants.

Spragge, C.] [May 21.

MOORE v. BUCHNER.

Arbitration and award—Jurisdiction—Time for enforcing award—Costs.

In answer to a bill to enforce an award, the defendants submitted to the Court a number of matters as objections to the award, and asked a reference back to the arbitrator with certain instructions, or a reference to the Master as to the matters in dispute. At the hearing on bill and answer, the defendant objected (1), to the jurisdiction of this Court, the submission providing that the submission and award should be made a rule of the Queen's Bench or Common Pleas.—(2), that the filing of the bill was premature, the time for moving against the award not having expired.

Held, that a proceeding to enforce an award must be taken after the time for moving against it has elapsed.

Held, also, that the objection to the jurisdiction would have prevailed if properly taken, as the parties to the submission had agreed upon their *forum;* but the defendant having submitted to the jurisdiction by his answer, and himself asked the intervention of the Court, could not now be heard to object.

It appearing that there was no reason for filing a bill instead of proceeding in the usual way,

Held, that the plaintiff was entitled only to such costs as he would have been entitled to if he had proceeded to enforce the award under the statute.

McClive, for plaintiff.

Plumb, for defendant.

Spragge. C.] [May 25.

ROSS v. POMEROY.

Statutes of limitations—R. S. O. cap. 108.

The plaintiff, administrator of a mortgagee, filed his bill against the mortgagor on or before 20th October, 1864. After service, and on 15th November, 1864, an arrangement was entered into between the parties, whereby the plaintiff took notes for the mortgage money, the first payable 1st June, 1866, and the others in the six following years. Proceedings on the mortgage were then suspended. Pomeroy made a payment in June, 1867, and died 16th July, 1869. The notes were not paid. The suit was then, on 29th August, 1879, revived against the infant heir of the mortgagor.

Held, that the plaintiff was barred by R.S.O. cap. 108, sec. 23, but in case of the plaintiff's desiring to obtain the benefit of a judgment recovered against Pomeroy, the bill was retained as against the infant defendant, as he would be a proper party in a proceeding against Pomeroy's personal representative.

Maclennan, Q. C., for plaintiff.

Plumb, for defendant.

Boyd, C.] [May 18.

MCLELLAN v. MCLELLAN.

Election—Dower—Provision by will.

A testator devised to his widow his "house and orchard for herself and her children, as long as she may live;" and to his son, *Duncan*, all his right, title, and interest, in and to the said land, and all implements thereon, "at the death of my wife, as aforesaid, on condition that he shall provide for her the necessary comfort and supplies for her board and maintenance, he, my son, Duncan, holding possession of the land rom the time of my decease, subject to the proviso aforesaid."

Held, that the widow was not entitled to the provision made for her by the will, and also to dower out of the land devised, but that she was put to her election in respect thereof.

Hoyles, for plaintiff.

J. Hoskin, Q. C., and *A. Hoskin*, Q. C., for defendants.

Boyd, C.] [May 11.

FENELON FALLS v. VICTORIA RAILWAY CO.

Demurrer—Municipality—Railway Act—Trespass.

The plaintiff, a municipal corporation, filed a bill, seeking to restrain the defendants, a railway company, from trespassing, by running their track along one of the streets of the municipality, without the consent thereof, thus impeding the traffic, in contravention of the Railway Act, C. S. C. ch. 66, sec. 12, ss. 1.

Held, that by virtue of the Municipal Act, there is such power of management, control, &c., bestowed upon municipalities, and such a responsibility cast upon them, as to justify them in intervening on behalf of the inhabitants for the preservation of their rights.

Semble—But for the language of SPRAGGE, V. C., in *Guelph* v. *Canada Co.*, 4 Gr. 656, where he says, "I think the suit is not improperly constituted," that the proper frame of the suit would have been by way of information in the name of the Attorney-General, with the corporation as relators.

Hodgins, Q. C. for plaintiffs.

Cattanach, for defendants.

Proudfoot, V. C.] [May 16.

HATHAWAY v. DOIG.

Injunction — Practice — Irreparable damage—Restraining nuisance—Public nuisance.

Although a man may be engaged in a perfectly legitimate trade or calling, he will not be permitted to carry on the same in such a manner as to cause a nuisance or unreasonable inconvenience to his neighbors, and in order to obtain an interlocutory injunction to restrain his so doing, it is not necessary for the plaintiff to show that the damage is irreparable. Therefore, where a man was engaged for some time in a thickly inhabited part of the city of Toronto, in the manufacture of gas receivers and was in the month of Feb., 1881, engaged in contracts for the manufacture of vessels which required the joining together of boiler plates by rivetting, which created so great a noise as to render the occupation of the plaintiff's house, distant only about fifteen feet from the factory, difficult, and whereby the wife of the plaintiff, who was the owner of the house, was kept in a nervous state of health, and a bill was filed in April, the Court [PROUDFOOT, V. C.], upon an interlocutory application, restrained the defendant from "continuing his works so that the noise cause a nuisance to the plaintiff."

The fact that the nuisance, if a nuisance at all, was alleged by the defendant to be a public nuisance, and should be moved against by the Attorney-General, formed no ground for refusing relief to the plaintiff, although the property on which the injury was inflicted was the property of the wife of the plaintiff, not his own.

Blake, Q. C., and *Moss* for plaintiff.

Maclennan, Q.C., and *McCarthy* for defendant.

Proudfoot, V. C.] [May 17.

CAMPBELL v. MOONEY.

Will, construction of—Devise in trust to sell—Power to mortgage—Family—Children.

A testator devised all his landed property, or his interest therein to be held by his executors until his youngest child came to maturity, but should it appear to his executors to be to the advantage of the infant members of his family to dispose of his real estate, or his interest therein, "they might dispose of it by sale;" and gave them all power and authority vested in himself to dispose of the same, holding the proceeds for the benefit of his widow and infant members of his family; and as soon as the youngest child came of age he desired that a suitable provision should be made for his widow, and that all his property be sold, if not previously disposed of, and the surplus divided amongst his family. He named his wife and two others as executors, but his widow alone proved the will; the other two renounced.

Two of the children came of age, and they joined the widow in creating a mortgage in favor of the plaintiff to raise money wherewith to pay a balance of money due the Crown on the land devised.

Held, that under the words of this devise the power to sell did not authorize the creation of a mortgage by the executors; but that so far as the interests of the widow and of the two adult children were concerned, the mortgage bound them; and that the money raised by the mortgage, having been expended in the payment of a balance of purchase money due on the devised land, must be considered as salvage

money, and the persons making the advance therefore entitled to a charge on the lands.

The word "family," in the connection in which it was used by the testator, meant "children."

COMMON LAW CHAMBERS.

Hagarty, C. J.] [May 14.

IN RE MCCRACKEN V. CRESWICK.

Division Court Act, 1880—Prohibition—Jurisdiction—Interest—Promissory note.

Plaintiff sued on a promissory note for $73.14, dated 1st April, 1875, payable six weeks after date, with interest at seven per cent. The principal and interest together amounted to $103.44.

Held, that under the Division Court Act, 1880, the amount of fixed legal damages in the nature of interest for non-payment of a promissory note need not be under the signature of the defendant, and the above claim could therefore be recovered in a Division Court.

Holman, for plaintiff.

Perdue, for defendant.

Hagarty, C. J.] [May 20.

IN RE DRINKWATER V. CLARRIDGE.

Division Court—Negotiable instrument—Judgment—Mandamus.

In a suit in a Division Court upon a negotiable instrument, where the defendant does not dispute the claim, the plaintiff is entitled to enter judgment for the amount claimed, without the production or filing of the instrument sued upon.

Stonehouse, for plaintiff.

Perdue, for the Division Court Clerk.

REVIEWS.

PRINCIPLES OF THE CRIMINAL LAW.—A concise exposition of the nature of crime, the various offences punishable by the English law, the law of criminal procedure, &c. &c., by Seymour F. Harris, B. C. L., M. A. Second Edition. Revised by the author and F. P. Tomlinson, M. A., of the Inner Temple London. Stevens & Hagues, Law Publishers, Bell Yard, Temple Bar, London, 1881.

The first edition was only published in 1877. It was received with much favor, being a compact, clearly expressed statement of the subject treated of. As we have already noticed this excellent work we shall not now speak of it at any length. The last edition does not differ materially from the first. The most important act passed in England within the purview of the book since 1877 is the Summary Jurisdiction Act, 1879. This is discussed in the chapter on summary convictions. In other respects the necessary corrections appear to have been made to make the book accord with such other changes as have been made.

THE LAW AND PRACTICE OF JOINT STOCK COMPANIES, UNDER THE CANADIAN ACTS, by Charles Henry Stephens, of the Montreal Bar, Author of the Quebec Law Digest. Toronto, Carswell & Co., Law Publishers, 1881.

This book assumes to be "a practical treatise on the law of Commercial and Joint Stock Associations, in the form of a commentary on the Canada Joint Stock Companies Act, 1877; with which is included most of the other Companies' Acts, both general and local; as also a number of forms relating to the management of such companies."

The author commences with an introduction, which is interesting as an historical resumè of the birth and growth of corporations and companies. He then speaks of joint stock companies, in reference to their definition, promotion, formation, incorporation, organization management, and dissolution. This introduction is, we think, the best part of the book.

The author claims to aim chiefly at conciseness. Were it not for this announcement, we should have thought that the style was somewhat diffuse, and that a sermonizing strain occasionally appears, not in keeping with the practical, concise treatment of the subject required.

We could easily, however, overlook faults of this kind, and occasional amplifications of abstract propositions which nobody denies, and which swell the volume without any compensating advantage, were not statements made which are so misleading as to shake our confidence in other matters which very probably would, on examination, prove to be accurately annotated. For example, section 15 of the Joint Stock Companies Act, 1877, provides that "the directors may at any time *within* six months after the passing of any such resolution (as to an application for supplementary letters patent), petition the Governor," &c. The author, after a dissertation as to the disasters likely to follow from a company's "launching out into enterprises other than those for which it was formed," thus speaks of the provision alluded to (p. 150): "As an additional safeguard it is provided that a period of *six months must elapse* from the time of the passing the resolution, *before* the petition may be presented, thus giving to all interested ample opportunity for deliberation," &c. The unhappy solicitor who might follow the author and not the Statute, would find no comfort in the fact, when turned round, and told that the petition should have been presented *within*, and not *after*, the six months had elapsed. This is not a case of doubtful construction, but mere carelessness, almost unaccountable.

Whilst a candid criticism compels us to refer to these defects, there is much in the book that will be of use. A large number of cases are referred to, and it is a great help to have a convenient arrangement of the subjects treated of. The mere typographical execution is good, but the proof has been carelessly read, at least in this, that cases cited are given in various kinds of type, and there is no uniformity in the citations, which do not appear to have been verified, as there are various mistakes in names, nd some of them are unintelligible.

LAW STUDENTS' DEPARTMENT.

The following are some of the Examination Papers of Hilary Term, 1881:

FIRST INTERMEDIATE EXAMINATION.

Williams on Real Property.

HONORS.

1. A. is entitled to an estate in remainder upon the decease of B, during whose life C. is tenant. A. believes B. to be dead, but is unable definitely to ascertain whether or not such is the fact. What course would you advise him to adopt?

2. State shortly the effect of the two statutes of Elizabeth as to fraudulent and voluntary conveyances.

3. By what means can property be granted so that upon the grantee doing some act another person shall acquire a title to the lands?

4. Into what three kinds may incorporeal hereditaments be divided? Give an example of each.

5. A. leases to B, who covenants to pay rent, B. assigns to C, and C. to D. Who is now liable to the rent? Explain.

6. What doctrine of law formerly deterred lessors from granting licenses to their lessees to commit a breach of some covenant, a breach of which by the terms of their lease would give a right to re-enter? What is now the law upon the subject?

Mercantile Law, &c.

HONORS.

Discuss the question of the necessity for a request in order to make a complete contract. Answer as fully as you can.

2. Give, after Smith, the general rules as to the way in which a contract ought to be evidenced and construed.

3. State as fully and particularly as you can, the remedies which one partner has against another in reference to partnership transactions.

4. Distinguish between a pledge and a mortgage, and write short notes on the rights of a pledgor and pledgee, respectively.

5. The holder of a note dated at Toronto, made by A. payable to the order of B., and endorsed by him, hands it to you for suit. What

considerations should govern you in determining whether or not you should sue both A. and B. in the same action, and what inquiries should you make in order to determine the liability of the party or parties to be sued? Answer as fully as possible, referring briefly to the purport of any statutory enactments in any way involved in your answer.

6. In an action on a contract in which A. B. and C. are joint contractors, A. and B. alone are sued, because the right of action against C. is barred by the Statute of Limitations; A. and B. plead in abatement the non-joinder of C. In what ways may the plaintiff meet this defence? Answer fully, giving reasons for your answer.

SECOND INTERMEDIATE.

Equity Jurisprudence.

1. Explain and illustrate the jurisdiction of equity in ordering the cancellation and delivery up of documents.

2. Define "Accident," and explain what must be established in order to give a Court of Equity jurisdiction.

3. Explain the remedy by injunction, and state what is the object of the process.

4. What is a *donatio mortis causa*, and in what respects does it differ from (1) a legacy, or (2) a gift *inter vivos?*

5. In what cases will a settlement made in consideration of the wife's equity to a settlement be binding against the husband's creditors?

6. Where a "conversion" is directed, what acts of the owner of the property to be converted are sufficient to lead to an inference that he intended to possess such property according to its actual state and condition.

SECOND INTERMEDIATE.

PASS PAPER.

Books III. and IV. Broom—Underhill on Torts, &c.

1. A. and B. are fellow servants working, chopping wood for a farmer, C. By carelessness and want of skill A. severely wounds B. with an axe. Is C. liable to B. for damages for the injury? Explain fully the principle (if any) applicable in such a case.

2. Discuss to what extent is it true that a tort may become merged into a felony. Answer fully.

3. Define Robbery and Larceny respectively?

4. What do you understand by *intention* in criminal law? How is it proved?

5. Define Trover. What is the legal effect on the property in the goods of the recovery of a verdict by plaintiff?

6. To what extent is a husband liable for the torts of his wife? Discuss briefly.

SECOND INTERMEDIATE.

Contracts.

1. Give examples arising out of our law of the terms of express contract being varied or overridden by the *lex loci.*

2. Define "*consideration*" in cases of contract. Write short notes on the effect of its presence or absence in various kinds of contracts.

3. What is the legal effect of a verbal contract (*a*) for a year's service to commence at a future day, (*b*) a contract to enure "so long as the defendant shall think proper," (*c*) a contract which is to be performed on one side but not on the other within a year. Give reasons in full for your answer.

4. Explain the expression that *choses* in action are not assignable, and give exceptions to the rule.

5. Mention the various purposes for which evidence of usage or custom may be offered in connection with the interpretation of written documents.

6. Where under the present practice accounts and inquiries are directed in a Common Law case to be taken by a Master in Chancery, what are the proper steps to be taken, and how and when are appeals from the Master to be disposed of? Answer fully.

CORRESPONDENCE.

Marriage with Deceased Wife's Sister.

To the Editor of THE CANADA LAW JOURNAL :—

SIR,—I am glad to observe, by the article in your issue for 1st May, on the present state of the Marriage Law, that you contemplate a further discussion of questions affecting the marital relation, which will probably engage the attention of the Dominion Parliament ere long.

In my communication on the subject of Marriage with a Deceased Wife's Sister, which appeared in your magazine on 1st April, I stated that such an alliance was "as unlawful in Canada as it is in England ;" although I was free to admit that in Canada, at present, it was in the power of anyone so disposed, to disregard this prohibition with impunity. A writer in the *Canada Law Times*, for 1st May, impugns the accuracy of this statement. He contends, with much apparent plausibility, that my position is untenable, on the ground that, for the lack of competent judicial authority to set aside such marriages, they cannot be invalidated in this Dominion.

Notwithstanding this obvious defect in our system of jurisprudence, I must adhere to the assertion that an alliance of this description is "unlawful in Canada." Whatever opinions may be entertained as to the propriety of legalizing them, there can be no doubt that nothing short of positive legislation could accomplish this result, for as the law now stands, such alliances are directly forbidden.

The supreme authority of the Imperial Parliament extends over all parts of the realm : and until the Crown and Parliament of the Mother Country has sanctioned a deviation from the public law of the empire, by colonial legislation, on any matter of common concern, the law as defined by imperial legislation must everywhere prevail.

Marriage is a relation which claims to be of equal obligation in all parts of the realm. It must, therefore, be governed by the common law of the empire, at least until a special local law, sanctioned by the supreme authority, has been enacted.

The views of Her Majesty's Government on this subject were well expressed by the Duke of Newcastle, when Secretary of State for the Colonies, in a despatch to the Governor of Victoria, dated 19th February, 1861, announcing the disallowance by the Crown of a local act concerning divorce. His Grace remarks that "the formal *mode* of contracting marriages is no doubt a fit subject for the discretion of Colonial Legislatures, because, as a general rule, no difference of mere form can render a marriage bad in any part of Her Majesty's Dominions which is valid in that part where it was contracted. The case, however, is very different in respect to the *essential conditions* of marriage. Whatever the effect of a colonial law may be within a colonial jurisdiction, I believe it to be at least most doubtful whether a marriage wanting in these conditions can be made valid in England by any colonial law; and if this be not the case, if the validity of such marriages and divorces is confined, at most, to the colony in which they take place, the greatest embarrassments might result from the prevalence of different laws in different parts of the empire. Marriages, legally contracted in one colony, would be inoperative for all legal purposes in another." * * * "Children, legitimate in one part of the empire, might in another find themselves incapable of inheriting their parents' property anywhere else. In fact, it is impossible to foretell the distress, insecurity, and litigation which might arise from such a state of things. These evils would not be confined to the colony whose legislation had given birth to them—they are essentially imperial. The probability of such evils renders it the duty of the Home Government, as far as its power extends, to maintain throughout the empire that essential uniformity in the law of marriage which alone can effectually prevent them."

These conclusions were uniformly adhered to by the Imperial Government up to the year 1861. They are confirmed by an Imperial Statute passed in 1865, to remove doubts as to the validity of certain colonial marriages, which expressly declares that the benefits of this act shall not extend to give effect—outside of the colony wherein it took place—to any marriage which had not been contracted "according to the law of England." And they agree with the provisions of the Upper Canada Statute, 11 Geo. IV., c. 36, which authorizes ministers of

various denominations within the province to solemnize marriage "between any two persons, neither of whom is under any legal disqualification to contract matrimony":—such "legal disqualification" being nowhere defined except in the Imperial Statute-book.

The legality of certain doubtful marriages, heretofore contracted in the colonies, pursuant to colonial legislation, was confirmed by the Imperial Act of 1865, above-mentioned. But before the Imperial law, which is applicable to this subject in all parts of the empire, can be changed in any colony, it is indispensable that express legislation shall have taken place in the particular colony, and that the sanction of the Crown shall have been given to the same. This has in fact been done, within the past ten years, in various parts of the British dominions, by colonial enactments, authorizing, within the limits of the respective colonies, marriage with a deceased wife's sister. Similar power was conferred by the British North America Act of 1867, upon the Parliament of Canada to deal with all questions in relation to "Marriage and Divorce." But hitherto the Canadian parliament has refrained from passing any such measure. I am therefore warranted in saying that we are still governed, on this subject, by the general law of the Mother Country, and that until the Dominion Parliament shall enact to the contrary, alliances with a deceased wife's sister are "as unlawful in Canada as they are in England."

ALPHEUS TODD.

Ottawa, 28th May, 1881.

The following is a copy of the report of the Minister of Justice on the River and Streams Bill:

DEPARTMENT OF JUSTICE,
OTTAWA, May 17th, 1881.

I have the honor to report with respect to an Act passed by the Legislature of the Province of Ontario at its last session, intituled:—"An Act for protecting the public interests in rivers, streams, and creeks."

Application for the disallowance of this Act has been made by Mr. Peter McLaren, of the town of Perth, lumber manufacturer, on the ground in effect that the Act in question deprives him of vested private rights without compensation, and practically reverses the decision of the Court of Chancery, in a case brought by him against one Caldwell, whereby Mr. McLaren's exclusive right to the use of improvements erected by him or those through whom he claims on certain streams in the Province of Ontario was established by a decree of the court.

The Act by its first section declares that all persons have, and always have had, during the spring, summer, and autumn freshets the right to float and transmit saw logs, &c., down all rivers, creeks, and streams, in respect of which the Legislature of Ontario has authority to give this power, and in case it may be necessary to remove any obstruction from such river, creek, or stream, or construct any apron, dam, &c., down the same, it shall be lawful for the persons requiring to float down the saw logs, &c., to remove such obstruction, and to construct such apron, dam, &c.

The second section declares that in case any person shall construct in or upon such river, creek, or stream any such apron, dam, etc., or shall otherwise improve the floatability of such river, creek, or stream, such persons shall not have the exclusive right to the use or control thereof; but all persons shall have a right to use them, subject to the payment to the person who has made such constructions and improvements of reasonable tolls.

The third section extends the operations of sections one and two to all rivers, creeks, and streams mentioned in the first section, and to all constructions and improvements made therein, whether the bed of the river, etc,, or the land through which it runs, belongs to the Crown or not.

The fourth section empowers the Lieutenant-Governor-in-Council to fix the amounts which any person entitled to tolls under the Act shall be at liberty to charge on saw-logs, &c.

The fifth section extends the previous provisions of the Act to all such constructions and improvements as may hitherto have been made, as well as to those hereafter constructed.

The sixth section gives to all persons driving saw logs, &c., down the streams, the right to go along the banks.

The seventh, and last section, declares that if any suit is now pending, the result of which will be changed by the passage of this Act, the court may order the costs of the suit to be paid by the party who would have been required to pay the costs if the Act had not been passed.

It is tolerably clear that this section refers specially to the suit of McLaren against Caldwell above referred to. It appears that Mr. McLaren is the owner of certain streams and improvements on streams which he makes use of for the purpose of floating down saw logs from the timber limits from which he takes the same for the purposes of his business as a lumber manufacturer.

Mr. Caldwell is also a lumber manufacturer owning timber limits in the neighborhood of those owned by Mr. McLaren.

He attempted to float his logs down Mr. McLaren's streams and through his improvements. To prevent his doing so, the suit in chancery above referred to was instituted, and a decree was made declaring Mr. McLaren exclusively entitled to the use of the streams and improvements and restraining Mr. Caldwell from floating his logs down the same.

That case has been appealed to the Court of Appeal. The effect of the Act now under consideration must necessarily be to reverse the decision of this suit.

Had this Act, instead of giving to any person desiring to make use of the streams the right to use the same upon payment of certain tolls absolutely expropriated the whole ownership of the streams for the public use, and provided a means of compensating the owners for the property so taken from them, it would be less objectionable in its features.

The effect of the Act as it now stands seems to be to take away the use of the property from one person and give it to another, forcing the owner practically to become a toll-keeper against his will, if he wishes to get any compensation for being thus deprived of his rights.

I think the power of the Local Legislature to take away the rights of one man and vest them in another, as is done by this Act, is exceedingly doubtful, but assuming that such right does in strictness exist, I think it devolves upon this Government to see that such powers are not exercised in flagrant violation of private rights and national justice, especially when, as in this case, in addition to interfering with the private rights in the way alluded to, the Act overrides a decision of a court of competent jurisdiction by declaring retrospectively that the law always was, and is different from that laid down by the court.

In reporting upon a reserved bill of the Prince Edward Island Legislature in 1876, the then acting Minister of Justice reported to Council, and his Excellency was advised to withhold his assent from the bill, one of the grounds being that the bill was retrospective in its effect; that it dealt with the rights of the parties then in litigation, and that there was no provision saving the rights of private parties.

On the whole I think the Act should be disallowed. I recommend, therefore, that the Act passed by the Legislature of Ontario at its last session, intitule l: "An Act for Protecting the Public Interests in Rivers, Streams, and Creeks," be disallowed.

(Signed)

JAMES MCDONALD,
Minister of Justice,
per J. A. M.

THE LATE LORD BEACONSFIELD.

It is stated, on the authority of Mr. Ralph Disraeli, that the late Lord Beaconsfield, after serving for a certain time as articled clerk in the Old Jewry, entered as a student of Lincoln's Inn and kept several terms, although he was not called to the bar. 'J. C. B.' states that Lord Beaconsfield 'became nominally a pupil of his cousin, the late eminent conveyancer, Mr. Nathaniel Basevi, who told me, some years afterwards, that "Ben Disraeli" showed no liking for law, and generally occupied himself at chambers with a book, brought somewhat late in the day by himself. The work I remember as having been particularised was Spenser's "Faerie Queene," bound in green morocco."' Mr. George H. Parkinson, of the Central Office, Royal Courts of Justice, has published the following extract from his diary of 1852, when he was clerk to Baron Parke:

'Saturday, June 12, 1852.—Mr. Disraeli, the new Chancellor of the Exchequer, came down about two, to be sworn in. He was quite alone; and Davis, the usher, showed him into the judges' private room, where I happened to be arranging some papers. I placed him a chair, and said I would go and tell the judges he had arrived. In a few minutes they came in—Lord Chief Baron Pollock, Barons Parke, Alderson, Rolfe, and Platt. All seemed to know him, and all talked and laughed together. His new black silk robe, heavily embroidered with gold bullion fringe and lace, was lying across a chair. "Here, get on your gown," said Baron Alderson; "you'll find it monstrously heavy." Oh, I find it uncommonly light," said the new Chancellor. "Well, it's heavy with what makes other things light," said the Lord Chief Baron. "Now, what am I to say and do in this performance?" was the next question. "Why, you'll first be sworn in by Vincent, and then you'll sit down again; and if you look to the extreme left of the first row of counsel you will see a rather tall man looking at you. That is Mr. Willes out of Court, but Mr. Tubman in Court; and you must say, 'Mr. Tubman, have you anything to move?" He will make his motion and when he sits down you must say, 'Take a rule, Mr. Tubman,' and that will be the end of the affair."

'The ushers were summoned, and all marched to the Bench—Baron Platt as junior baron first, Mr Disraeli last, immediately preceded by the Lord Chief Baron. Mr. Vincent, the Queen's Remembrancer, administered the ancient oath in Norman-French, I think. Mr. Tubman (afterwards Mr. Justice Willes) made some fictitious motion, was duly desired to "take a rule," and the Chancellor and barons returned to the private room. "Well, I must say you fellows have easy work to do, if this is a specimen," said Mr. Disraeli. "Now don't you think that, or you'll be cutting down our salaries," replied one of he judges. "Take care of that robe," said Baron Alderson; "you can leave it to your son when the Queen makes him a Chancellor." "Oh, no; you've settled that business," said the new Chancellor; "you'd decide that was fettering the Royal prerogative." There was a general roar at this witty allusion to a very important case just decided in the House of Lords, in which the Peers had held that a large monetary bequest by the late Earl of Bridgewater to his son, on condition that he should obtain the title of Duke within a certain time, was void, on the ground that it was a fettering of the Royal prerogative.'

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DIARY FOR JUNE.

4. Sat...Easter Term ends.
5. Sun...*Whit Sunday.*
8. Wed...First meeting of Parliament at Ottawa.
12. Sun....*Trinity Sunday.*
13. Mon...County Court Term for York begins.
14. Tues..County Court sitt. (except York) begins.
15. Wed..Magna Charta signed, 1215.
17. Fri ....Burton and Patterson, JJ. Ct. of Appeal, sworn in, 1874.
18. Sat....Earl Dalhousie, Gov.-General, 1820. Battle of Waterloo, 1815.
19. Sun...*1st Sunday after Trinity.* County Court Term ends.
20. Mon..Accession of Queen Victoria, 1837.
21. Tues..Galt, J., sworn in C. P., 1869.
23. Thurs. Hudson Bay Co. Territory transferred to Dom., 1870.
26. Sun . .*2nd Sunday after Trinity.*
28. Tues...Queen Victoria crowned, 1837.
30. Thurs. Hon. J. B. Robinson, Lt. Gov. of Ontario. P. E. Irvine, Prest. of P. of Canada.

TORONTO, JUNE 15, 1881.

WE HAVE before us a letter from a valued correspondent on the subject of reporting; referring especially to the reporting of cases wherein no written judgment is given. We will return to the subject hereafter.

MECHANICS seem at length to be arriving (judging from remarks noticed in the secular press) at a conclusion which we prophesied long ago, viz.: that the Act passed for their protection is not all that they expected. It has been a nuisance to many, and of very little benefit to any one. Another measure passed for the relief of that fraud of the 19th century—the "working man"—has also received execration from a different class. The employer who hires a servant is now practically without redress when left in the lurch at a critical moment. Both measures are said to have resulted from a desire to influence the "free and independent" element, and neither have been found satisfactory.

A CORRESPONDENT takes to task some criticisms which have appeared in these columns extracted from advanced sheets of Messrs. Taylor & Ewart's work. Like, we fancy, most of our readers, we still remain in happy ignorance as to who is right. We feel like boys of a certain turn of mind, who like to keep their sugar-stick till the last moment. It would be a fatal mistake by anticipation to spoil the delights of a long vacation by beginning too soon the study of the Judicature Act. One cannot fancy a holiday more enjoyably spent. The Attorney-General is doubtless happy in that the legislature has been safely delivered. If the parents alone had the care of the infant the profession would be happy too.

AN article lately published in this journal (p. 74), on the right of Queen's Counsel to defend prisoners, has been copied into the London *Law Times* and the Irish *Law Journal.* A correspondent writes to the former paper as follows:

"For many years it has been, and it is still, the undoubted practice for those who desire to retain a Q. C., to appear for a defendant in a criminal case, to apply to the Treasury for a license to enable him to do so; and I remember the late Chief Justice Wilde declining to hear a Queen's Counsel for a defendant, on the ground that his license had not been received, although it had been duly applied for, and was on its way to Worcester, the assize town. The modern practice, however, is for judges to accept an official notification that a license has been applied for, and that it will be duly forwarded."

DOMINION CONTROL OVER PROVINCIAL LEGISLATION.

(Continued from page 221.)

The next precedent specially worthy of notice appears to be that of the Act relating to the Goodhue Will, being 34 Vict., c. 99, Ont., which has been already alluded to. The Lieut.-Governor, Sir W. Howland, assented to the Act, but in transmitting it to the Governor-General, said: "I regard the principle involved in the Bill, and sanctioned by the Assembly, as very objectionable, and forming a dangerous precedent; but in the absence of instructions, and upon the advice of my Council, I gave it assent" (Can. Sess. P. 1877. No. 89, p. 181.).

Mr. Becher, one of the trustees under the will, however, memorialized the Governor-General against the Act, in which he submitted that the enactments of the said Bill were beyond the powers of the Legislature, "and unconstitutional in depriving persons of rights and property without their consent and without any compensation whatever." And he annexed a list of his objections to the Bill, in which he argued that it was without precedent, unnecessary, and a violation of the rights of property—(*ib.* p. 181-184).

The Minister of Justice, Sir John Macdonald, however, on Feb. 22, 1872, reported simply that "as it is within the competence of the Provincial Legislature," it should be left to its operation. This was accordingly done.

It is noticeable, however, that when the validity of this Act came before the Court of Appeal (19 Gr. 367), all of the judges who touched on the merits of the Act at all expressed strong disapprobation of such legislation. Chief Justice Draper, indeed, goes so far as to say, (p. 381)—

"It would be indecorous to express what it would be fitting for a Court to express, if such changes had been procured in the testator's lifetime, by or through any fraud or imposition upon him. . . . It cannot, however, be disrespectful to quote the language of Lord Tenterden: 'It is said, the last will of a party is to be favorably construed, because the testator is *inops consilii*. That we cannot say of the Legislature; but we may say that it is *magnas inter opes inops*.'"

And, as has been shown above, he indicates in the passage there quoted that in his view the Governor-General might rightly have disallowed the Act.

Such an opinion is clearly an authority in favor of the constitutional right to veto such legislation, and the expressions in that and other of the judgments as to the injustice of such legislation, may have influenced the Dominion Executive in their action as regards subsequent legislation to which similar objections were held to apply.

The next case in point seems that of Mr. Ryland, who in 1875 petitioned the Governor-General complaining of a bill then pending in the Quebec Legislature, which he alleged, was to the detriment of his vested rights and interests in respect of the registrarship of Montreal, which had been conferred upon him, by the Imperial Government, in lieu of a patent office formerly held by him under the crown in Canada.

A number of the professional and influential inhabitants of Montreal, also memorialised the Governor-General against the bill, declaring that "if carried into execution, it will cause inconceivable difficulty and confusion, in procuring the necessary information in the transfer of property and investment of capital, and, in many cases, will quadruple the present cost and expense of registration." (Can. Sess. Pap. 1877. No. 89. p. 257).

Mr. Edward Blake, then minister of Justice, in a long report as to this act, expressed views favorable to the justice of Mr. Ryland's complaints, and, saying he was disposed to believe that the considerations to which he had adverted could not have been brought to the attention of the local authorities, he recommended that they should be afforded an opportunity of reconsidering the the legislation in question with the light

thrown upon it by the petitions and representations before him.

With regard to the petition of the inhabitants of Montreal, he remarks: "Its representations do certainly deserve the greatest consideration at the hands of those entrusted with legislative powers in the matters to which they related. These matters, however important, are nevertheless essentially of a local character." (Can. Sess. Pap. 1877. No. 89. p. 264 5).

In reply, the Lieutenant-Governor of Quebec declared that Mr. Ryland had had ample time to present his objections to the legislation in question to the Quebec legislature,—denied he would suffer a pecuniary wrong,—submitted that the legislature of Quebec had not overstepped its constitutional limits, and declared that the legislature was disposed to do full justice to Mr. Ryland. In conclusion he says:—

"The essentially local character of the measure not being contested, and the facts represented by Mr. Ryland in support of his position being incorrect in their most important part, I would respectfully represent to His Excellency, that my Government could not, with a due regard to its own dignity, and to the respect it owes to the Legislature, propose the repeal of the law in question."—(*Ib. p.* 267.)

In a report on this despatch of the Lieut.-Governor, Mr. Edward Blake submitted that it gave a different complexion to the case, and that "as between the assertions of a Provincial government and an interested individual, faith and credit must be given to the representations of the former,"—and in consideration of the assurances that the Quebec Government were prepared to accord full justice to Mr. Ryland, and of the local character of the act, recommended the act should be allowed, which report was duly acted on.—(*Ib. p.* 268.)

The constitutional right of interference, if it had been thought expedient, by the Governor-General in Council, seems implicitly asserted in this report, and scarcely appears to be denied in the despatch of the Lieut.-Governor. But there are obvious distinctions between this case and an ordinary case of an individual complaining of injury to vested rights, inasmuch as the rights Mr. Ryland claimed to have respected had been conferred on him by the Imperial Government, in lieu of an office formerly held by him under the Crown in Canada.

The next precedents calling for notice appear to be those of the various Prince Edward Island Land Acts.

"For upwards of half a century," wrote the Lieut.-Governor of the Island in transmitting the reserved P.E. I. Purchase Act of 1874, for the consideration of the Governor-General, "the Land Question," so called, "has agitated the minds of the people of this Province, and repeated attempts have been from time to time made by the local legislature to get rid of the leasehold system prevalent here, and the aid of the Imperial Government has been frequently invoked for that purpose, by endeavoring to obtain its sanction to the establishment of a Court of Escheat, on the ground of the non-fulfilment by the grantees of the condition of their grants from the Crown, but to which Her Majesty's Government invariably refused to accede." (Can. Sess. papers, 1875, No. 61, p. 38.)

Certain parties interested petitioned the Secretary of State for the Colonies, that the royal assent might be withheld from this Land Purchase Act, of 1874. Whereupon the Colonial Secretary forwarded the petition to the Governor-General of Canada. In his report, dated December 23, 1874, the Minister of Justice, M. Fournier, now Judge of the Supreme Court, but then a member of Mr. Mackenzie's government, recommended the disallowance of this Act on grounds which clearly appear in the concluding paragraphs of his report (Can. Sess. papers, 1875, No. 61, p. 40.):—

"Several petitions are presented against the allowance of this Bill; some, as above stated, having been sent to the Secretary of State for the Colonies, and others directed to His Excellency. In transmitting one presented in

England, Lord Carnarvon requests the careful consideration of your Excellency's ministers in respect to it. They submit that the proposed Act is subversive of the rights of property, and that it will prove most ruinous to proprietors in the colony, and a dangerous precedent to establish as a mode of allaying popular agitation; after entering upon details of the past, they submit that the Act is without a precedent in the history of legislation, and that even if it were called for as constitutional as respects its object, the mode of procedure adopted by it would prove most ruinous and harassing to the owners of property in that Island. They allege that the government, which is practically irresponsible as it cannot be sued in a court of law, might hold this Act over the unfortunate proprietor who cannot force on the proceedings when once commenced, nor obtain compensation or costs when such proceedings have been abandoned; and they dispute the recitals to the Act, and pray for the disallowance of the same. The other petitions allege various reasons in respect to which they, as proprietors and British subjects, would be much injured and damnified if the Act passed. The allegations in these petitions are very forcibly urged, and represent features *which cannot but be regarded as contrary to the principles of legislation in respect to private rights and property.*"

"The undersigned is of opinion that the Act is objectionable, in that it does not provide for an impartial arbitration in which the proprietors would have a representation for arriving at a decision on the nature of the rights and the value of the property involved, and also for securing a speedy determination and settlement of the matters in dispute.

"Under all the circumstances of the case, the undersigned has the honor to recommend that the Bill so reserved, intituled "The Land Purchase Act, 1874," do not receive the assent of your Excellency in Council."

This Report was duly approved, and the Bill was disallowed.

Subsequently, in 1875, the Prince Edward Island Legislature passed another Land Act. In his report on this Act, dated May 26, 1875 (Can. Sess, P., 1877, No. 89, 338), M. Fournier, acting-Minister of Justice, observes that the objections on account of which the prior Act of 1874 was disallowed have been removed, "and a fair representation of the interests of all parties concerned, has been provided for, and an impartial tribunal has been insured to each proprietor." He says, therefore, that he is of opinion "that the subject dealt with in the Bill, is one coming within the competence of the Legislature, and *inasmuch as the objectionable features of the previous Bill have been removed*," he recommends that the Act of 1875 be assented to. The Act was accordingly allowed.

In 1876, an Act was passed to amend the said Act of 1875, and to validate certain proceedings had under it. This Act was reserved for the consideration of the Governor-General. Parties interested petitioned against it.

The nature of the provisions of this Act, are specially noticeable in connection with the present subject. In his Report on it, the acting-Minister of Justice, Mr. R. W. Scott, says:—(Can. Sess. Papers 1877. No. 89, p. 133)—

"The effect of the first portion of the Act, appears to be that the interpretation of the Supreme Court of the Island of the Act of 1875, upon which certain awards of Land Commissioners were held bad, is reversed, and the awards in question declared as valid. . . . The undersigned has the honor, under the circumstances, to report that there does not appear to be any reservation in the Act of the rights of . . . . parties to whom awards made."

In conclusion he says:—

"That without giving weight or consideration to any great extent to the allegations in the petitions which are unsupported by any actual proof, he is of opinion *that the reserved Bill is retrospective in its effect; that it deals with rights of parties now in litigation under the Act which it is proposed to amend, or which may fairly form the subject of litigation; and that there is an absence of any provision saving the rights and proceedings of persons whose properties have been dealt with under the Act of*

1875." He therefore recommends that the Bill entituled "An Act to amend the Land Purchase Act of 1875," do not receive the assent of the Governor-General in council.

The Bill was accordingly disallowed.

Shortly after this an Act was passed by the Legislature of Quebec, being 39 Vict. c. 7, "To compel Assurers to take out a license." A petition was presented to the Governor-General against this Act by the agents and managers of a large number of insurance companies carrying on business throughout Canada.

Mr. Edward Blake, then Minister of Justice, reported on this Act on Oct. 16, 1876 (Can. Sess. Pa. 1877. No. 89, p. 137). After remarking that the question as to the constitutionality of the Act might have much light thrown on it by a certain case then pending, and that therefore, it was better to defer any determination on this point for the present, and after disposing of the further objection that the law interfered with Canadian legislation, he goes on to deal with objections that had been raised by the memorialists with reference to the policy of the measure. This portion of the report has an obvious bearing on the present subject. The Minister observes that the tax to be raised by the requirement of a license is strictly for the purpose of revenue; and under B. N. A. (sec. 92 sub. s. 2) each Province may exclusively make laws in relation to "direct taxation within the Province in order to the raising of a revenue for Provincial purposes." He nevertheless proceeds to say:—

"The policy of laying a tax of this nature is open to great objection. It must fall, in the end, upon those interested in the assurances. It may be considered to be a tax upon providence and thrift, and its operation may have an injurious effect far beyond what may be recompensed by its pecuniary results, but these are views which, although they should be fairly weighed, *and although they might in some cases force upon the Canadian Government the necessity of disallowance*, are yet subject to this observation, that the people of a province who require to raise a revenue for their local wants, and who tax themselves for the purpose, may rightly claim, *and must fairly be permitted a considerable latitude in the determination what these shall be*, and that considerable confidence may be placed in local public opinion as a remedy for the indicated evils where they may exist."

He then goes on to observe that in one particular the Act appeared specially objectionable, viz., because it imposed upon companies, which had already contracted at a specified premium, calculated upon various elements, not, however, including a taxation of the gross premium,—a deduction not from its net profits, but from the gross premium—and the companies were not in a position to recoup themselves by calling upon the insured to pay the tax.

"This," he says, "seems objectionable in principle, and calculated to produce a feeling of insecurity abroad, with reference to Provincial legislation; and the undersigned recommends that the attention of the Lieutenant-Governor should be called to the provision with a view to its amendment during the ensuing session, at any rate, in so far as it affects contracts made before the passing of the Act."

In a report dated Oct. 19, 1876, duly adopted, the same Minister observes with regard to a certain Act of the Province of Quebec passed in 39 Vict. for the erection of certain parishes, that it is a question whether a Local Legislature can delegate its powers in the manner contemplated in that Act, and adds: "It seems to the undersigned, that it would avoid the questions to which he has referred, *and would be more in accordance with the true principles of legislation* that these cases should be dealt with, as heretofore, when they arise."

In the case of the Province of Manitoba there appear many specially strong examples of the exercise of the prerogative of disallowance. Thus in 1876 an Act respecting the survey of lands was disallowed on the Report of the Minister of Justice that it was "at present premature and unnecessary." (Can.

Sess.: P. 1877. No. 89, p. 229). Again in the same year another Manitoba Act was disallowed on a report of the Minister advising its disallowance: "especially as in his opinion, the original Act" (of which the Act in question was in amendment) "afforded all the necessary protection to the purchase of Half Breed Land rights."

Without pretending to have referred to all the precedents in point, it seems to be clear that so far as constitutional practice is at present settled, the prerogative of vetoing Provincial legislation may be constitutionally exercised by the Governor-General in Council, when the Acts in question :—

(1) Are illegal, as, for example, contravening Imperial Acts on the same subject matter and applicable to the colonies (Todd, 168-192):—

(2) Are unconstitutional as ultra vires the Provincial Legislatures under the B. N. A. Act :—

(3) Interfere with the concurrent jurisdiction possessed by the Dominion Parliament in the same subject matter :—

(4) Are opposed to the general interests of the Dominion : under which head may be cited those examples of acts of Manitoba and British Columbia disallowed or objected to because calculated to interfere with the projected building of the Canada Pacific Railway, (see Can. Sess. p. 1877, No. 89, p. 195; *ib.* p. 288); and under this head, indeed, should perhaps be put those cases where the enactments of the Provincial acts,

(5) Are opposed to sound principles of legislation; or at all events when they contain retroactive provisions divesting private rights and property. The above precedents show many examples of interference on thi ground, and the report of the Minister of Justice, published in the last number of this journal, shows the latest to be the recent disallowance of the Ontario Act of last session "for protecting the public interest in rivers, streams and creeks."

A. H. F. LEFROY.

LEGISLATION AS TO LEASES.

In a recent nnmber of the *Law Journal* there is an article on the "Leases Bill, 1881," which aims at the mitigation of the proviso for re-entry for breach of covenant, which occurs in every ordinary lease. A bill framed with a similar object was some time ago introduced by Lord Cairns, and has already passed the House of Lords. Our contemporary proceeds to discuss and contrast the two measures, in order, as it says, "to promote the speedy passing of the better of the two." As the subject is an important one, and will probably be found, sooner or later, to require legislative action in Ontario, we reproduce a portion of the article in the *Law Journal*, which, it will be noticed, expresses a preference for the measure introduced by the learned ex-Lord Chancellor.

"The principal clauses of Lord Cairns's bill, relating to the forfeiture of leases, and forming a small part of his bulky Conveyancing and Law of Property Amendment Bill, run thus :—

A right of re-entry . . . . for a breach of any covenant . . . . shall not be enforceable . . . . unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach if it is capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor for such breach. Where the lessor is proceeding by action, or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may . . . . apply to the Court for relief, and the Court may grant, or refuse, relief as the Court, having regard to the proceedings of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit ; and, in case of relief, may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or other matters relative to the breach, or to any subsequent like or other breach, as the Court in the circumstances of each case thinks fit.

The principal clause of the present Leases Bill runs thus :—

Where a lessor is proceeding by action, or otherwise, to enforce a right of re-entry . . . . or has within the last two preceeding months re-entered under any such right without action, the lessee may . . . . apply to the Court for relief, and the Court may grant or refuse relief, *i. e.*, [the remaining words follow those of Lord Cairns's clause]: provided that the costs of the action shall be payable on the same principle as if the application for relief were an action for the redemption of a mortgage.

Both the bills alike provide that they are to 'apply to leases made either before or after the commencement of this Act, and are to have effect notwithstanding any stipulation to the contrary;' also that they are to apply although the proviso has been inserted in the lease in pursuance of any statute; but Lord Cairns's bill does not contain a provision which appears in the Leases Bill that 'no effect shall be given' to a proviso for re-entry upon breach of a covenant that all assignments and underleases shall be prepared by the lessor's solicitor.

And now, which is the better measure, and why? We cannot but think that the first proviso of Lord Cairns's clause that there is to be no re-entry without prior notice and claim of reasonable compensation is a very valuable one, and has been most unwisely omitted from the Leases Bill. The qualification of the barbarous 'common form' proviso for re-entry by a 'common form' stipulation for notice has for many years been a customary insertion on behalf of the lessee's solicitor; and we very much doubt whether a soiicitor ought to allow his client to accept an absolute proviso for re-entry without a caution as to its possible results. The same remark would apply to trustees and mortgagees. Indeed, the term 'leasehold security,' when applied to the mortgage of a lease containing an absolute proviso for re-entry, is a delusion. However this may be, we think the stipulation as to notice is a highly desirable one to insert in the bill, upon the simple ground that it will lead to the difficulties being settled by correspondence between the parties—which will probably result in a new lease—instead of necessitating an immediate application to the Court.

We observe that neither bill contains, as former bills did, any exceptions. Former bills contained savings for the breach of a covenant against assignment without license, and for agricultural tenancies. We fail to see any reason for excepting agricultural tenancies from the operation of the bill; but strong reasons might be said for keeping out of its scope the breach of the covenant not to assign or underlet without license—a breach of such a kind being, it would be said, a 'wilful breach.' On the whole, however, we think that these arguments ought not to prevail. Cases may easily be imagined in which, from an impossibility of discovering the whereabouts of the ground landlord, there must be either an assignment without his leave, or no assignment at all.

It is only necessary to add that both measures provide a kind of code of the law as to 'relief against forfeiture,' except as to non-payment of rent, repealing the enactments 22 & 23 Vict. c. 35, ss. 4-9, and 23 & 24 Vict. c. 126, s. 2, by which the Court has power to give relief against a forfeiture caused by failure to insure. We see no reason for excepting the law of relief against forfeiture for non-payment of rent from the general consolidation, and hope that the promoters of the Leases Bill will see their way to supplying this defect."

SELECTIONS.

LARCENY OF ANIMALS.

IN *Rex* v. *Mann*, Supreme Court of the Hawaiian Islands, April, 1881, the defendant had been convicted of stealing turkeys. Two questions arose: whether the turkeys in question were "wild animals," and thus not subject of larceny; and whether ownership had been proved. The court, Judd, J., said: "The essential facts are as follows: On the mountain range of this island, back of Waialua, called the Waianæ mountains, are numbers of turkeys. These birds were brought to this country so long ago that there is no remembrance existing as to the exact time when or by whom they were imported. These birds are now in a wild state, afraid of man, breeding in the unfrequented parts of the mountain and bush country, and have been hunted down and caught by devices, precisely

as if they were *feræ naturæ*. They are not penned or fed, marked by the land-owner, nor does he exercise any actual control over them, except as he may be able to catch them and reduce them to his possession. It is well known that the domestic turkey is descended from the wild turkey, first found in America, modified by breeding and the care of man, and this accounts perhaps for the tendency to revert to the wild state which is so strongly manifested in them. These turkeys, although 'wild,' are not properly speaking 'wild animals.' Where the phrase 'wild animals' is used, the word 'wild' is used as a generic term to indicate that they are of a species not usually domesticated and does not refer to their comparative docility or familiarity with men. We consider that these turkeys are not properly speaking animals *feræ naturæ*, though partaking of their habits. The land on which the defendant is alleged to have taken the turkeys in question is the land of 'Mokulua,' in Waialua, the property of the prosecuting witness, Gaspar Silva, who claims the ownership of the turkeys by virtue of their being on this land and of value to him. Now to say that these turkeys are A.'s solely because they are on A.'s land, would lead to the absurdity that they would become B.'s, when they went on to B.'s land. Suppose on a cerain night A. goes into the woods on his own land and ensnares part of a flock of the so-called 'wild turkeys,' and the rest of the flock, being disturbed, cross over the boundary to the land of B., and the next night A. ensnares them on B.'s land. On the theory advanced, that the place of capture determines the ownership, the latter taking would be larceny. In the case before us, if the owner of the land where the alleged taking of the turkeys took place was able to trace them, as the undisputed descendants of birds owned by him or his grantors, he would thus show title to them. So far from this being the evidence in this case, it is more than probable that these turkeys are not the descendants of a parent stock introduced on this island by one person, but that these birds have received accessions at different times from the tame turkeys of many different individuals. In the absence, therefore, of proof of ownersnip of these turkeys by the prosecuting witness, aside from the fact that they were caught on his land, and it being proved that they cannot be distinguished from any other turkeys on contiguous lands, they are not the subject of larceny." Conviction reversed, and prisoner discharged.

This is in harmony with *State* v. *Mary Turner*, 66 N. C. 618. Mary was indicted for stealing "one turkey of the value of five cents." Thus it seems turkeys are cheap in North Carolina. The report does not disclose the date of the offence, but we infer it was shortly before Thanksgiving. Mary having been convicted, a motion in arrest of judgment was made upon the ground "that the indictment was insufficient, for that it failed to state that the turkey stolen was a *tame* turkey. That the turkey was a native fowl of America, large numbers are found in every part of the State, wild and unreclaimed, and the indictment should have negatived the presumption that the turkey in question was wild and unreclaimed." The motion was sustained, but this was reversed by the Supreme Court. The court said: His honor was mistaken in this case, in supposing that our domestic turkey is a creature *feræ naturæ*. All the authorities cited by his honor are cases of creatures *feræ naturæ*, and we take the case to be clear, that where a creature, for the stealing of which a defendant is indicted, is *feræ naturæ*, it will not be sufficient to allege that the property was the goods and chattels of one A, B., the owner; in such case, the indictment must further allege that the creature was dead, tamed, confined, or reclaimed. 2 Russ. on Crimes, 152. But surely this cannot be the case, when the defendant is indicted for stealing one of our domesticated turkeys. In 2 Bish. Crim. Law, secs. 787, 788, speaking of animals, *feræ naturæ*, and of which larceny may be committed when reclaimed, the author says, 'domestic animals and fowls, such as horses, oxen, sheep, hens, peafowls, turkeys, and the like; which being tame in their nature, are the subject of larceny on precisely the same grounds as other personal property.'"

The following animals have been held "wild": Deer, rabbits, hares, conies, fish, rooks, doves, pigeons, martens, bees. Whart. Crim. L., sec. 869. In *Warren* v. *State*, 1 Greene (Iowa), 106, it is said: "As this principle applies, by common law, to monkeys, bears, foxes, etc., it will evidently apply to 'coons.'"

But such animals as are reclaimed and confined, and may serve for food or use, are subjects of larceny. Thus, young pheasants hatched and reared by a hen. *R.* v. *Shickle*, L. R., 1 C. C. 158. Marked swans, even on

a public river. Dalt. Just. 156. Pea-hens. *Com.* v. *Beaman*, 8 Gray, 497. Pigeons in a cote. *R.* v. *Cheafor*, 5 Cox's C. C. 367. In this case Lord Campbell said: "The pigeons were the subject of larceny, although they had the opportunity of getting out and enjoying themselves." This is probably because of the *animus revertendi* in the birds.

In *Swan* v. *Saunders*, Q. B. Div., 44 L. T. (N. S.) 424, it was held that freshly imported parrots were not "domestic animals," within the statute of cruelty to animals. The court said: "I do not say that a parrot might not become a domesticated animal, when thoroughly tamed and accustomed to the society of human beings, but these were young unacclimatized birds freshly imported into England. They are clearly different from fowls and other poultry, and the evidence goes to prove that they were not tamed and domesticated."

In regard to fish, it is not so clear. All the books agree that if fish are confined in a tank or otherwise so that they may be taken at the pleasure of him who has appropriated them they are the subject of larceny. "Fish confined in a net or tank are sufficiently secured; but how, in a pond, is a question of doubt, which seems to admit of different answers, as the circumstances of particular cases differ." 2 Bish. Cr. L. sec. 685; 1 Hale's P. C. 511; Fost. Cr. 366. An English statute made it indictable to steal fish from a river, in any inclosed park. In a case "where the defendant has taken fish in a river that ran through an enclosed park, but it appeared that no means had been taken to keep the fish within that part of the river that ran through the park, but that they could pass down or up the river, beyond the limits of the park at their pleasure; the judges held that this was not within the statute." *Rex* v. *Corrodice*, 2 Russ. 1199.

Oysters planted and staked out where they do not naturally grow come within this rule. *State* v. *Taylor*, 3 Dutch. 117. They seem however barely to come within the description of animals. In the last case the court said: "The principle, as applied to animals *feræ naturæ*, is not questioned. But oysters, though usually included in that description of animals, do not come within the reason or operation of the rule. The owner has the same absolute property in them that he has in inanimate things or in domestic animals. Like domestic animals, they continue perpetually in his occupation, and will not stray from his home or person. Unlike animals *feræ naturæ*, they do not require to be reclaimed or made tame by art, industry, or education; nor to be confined in order to be within the immediate power of the owner. If at liberty, they have neither the inclination nor the power to escape. For the purpose of the present inquiry, they are obviously more nearly assimilated to tame animals than to wild ones, and perhaps more nearly to inanimate objects than to animals of either description. The indictment could not aver that the oysters were dead, for then they would be of no value; nor that they were reclaimed or tamed, for in this sense they were never wild, and were not capable of domestication; nor that they were confined, for it would be absurd." In *Fleet* v. *Hegeman*, 14 Wend. 42, the Court said: "Oysters have not the power of locomotion any more than inanimate things, and when property has once been acquired in them, no good reason is perceived why they should not be governed by the rules of law applicable to inanimate things." "They have been reclaimed, and are as entirely within his possession and control as his swans, or other water fowl, that may float habitually in the bay." But in *Caswell* v. *Johnson*, 58 Me. 164, oysters were held to be fish.

At common law the rule of property in reclaimed wild animals excluded many which were called "base," principally because they are not fit for food. But in this country the rule seems to be more flexible. Thus in *State* v. *House*, 65 N. C. 744; S. C., 6 Am. Rep. 744, a conviction of larceny of an otter from a trap was sustained. The court said: "All the distinctions as to animals *feræ naturæ*, and as to their generous or base natures, which we find in the English books, will not hold good in this country. The English system of game laws seems to have been established more for princely diversion than for use or profit, and is not at all suited to the wants of our enterprising trappers. We take the true criterion to be the *value* of the animal, whether for the food of man, for its fur, or otherwise. We know that the otter is an animal very valuable for its fur, and we know also that the fur trade is a very important one in America, and even in some parts of North Carolina. If we are bound absolutely by the English authorities, without regard to their adaptation to this country, we should be obliged to hold that most of the animals, so valuable for their fur, are not the subject of larceny, on account of the baseness of their

nature, while at the same time we should be obliged to hold that hawks and falcons, when reclaimed, are the subject of larceny in respect of their generous nature and courage."

Dogs are generally held not the subject of larceny, being "base." *State* v. *Holder*, 81 N. C. 527; S. C., 31 Am. Rep. 517; *State* v. *Lymus*, 26 Ohio St. 400; S. C., 20 Am. Rep. 722; *Ward* v. *State*, 48 Ala. 161; S. C., 17 Am. Rep. 31. But otherwise when they are taxed. *People* v. *Maloney*, 1 Park, 593; *Mayor* v. *Meigs*, 1 McA. 53; S. C., 29 Am. Rep. 578; *Ex parte Cooper*, 3 Tex. Ct. App. 489; S. C., 30 Am. Rep. 152; *Harrington* v. *Miles*, 11 Kans. 480; S. C., 15 Am. Rep. 355.

It has always been held that any dead animal, whose carcass is fit for food, or use, is subject to larceny; but the query arises whether a dead and stuffed dog is subject of larceny in those States where a live dog is not. Probably the expense of the stuffing would bring it within the rule. So a dead dog may be better than a live lion.—*Albany Law Journal.*

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COMMON PLEAS.

EASTER TERM—JUNE 1.

THE ONTARIO BANK V. MITCHELL.

Judgment debtor—Examination of—R. S. O., cap. 50, sec. 304.

In an examination of a judgment debtor under R. S. O., ch. 50, sec. 305, the object of the enquiry is to show what property or means the debtor has at the time of examination, which can be made available to the creditor, and the enquiry is not restricted to the period of the contracting of the debt, but it may be shewn that at some anterior time, no matter how far back the debtor had property as to which he may be required to give an account of, and it is not a sufficient answer to the enquiry merely to say that it has all been disposed of before the debt was incurred. A rule moved to set aside an order of commitment of defendant for his refusal to give an account of property had before the contracting of the debt, was therefore refused.

C. J. Holman, for plaintiff.
J. B. Clarke, for the defendant.

CHANCERY.

Boyd, C.] [June 1.

FRASER V. GUNN.

Mortgage, assignment of—Mortgage paid but not discharged—Subsequent incumbrancer—Priority.

The original owner of land created a mortgage thereon in favor of one M., and died without redeeming, and the equity of redemption in the premises descended to C. F., his heiress-at-law, who, with her husband, P. F., joined in a conveyance thereof to trustees charged with the support and maintenance of the plaintiffs, and subject to which and the mortgage in favor of M., the premises were vested in P. F. in fee, who subsequently, and in September, 1875, paid the amount due on M.'s mortgage, but which was not actually discharged. In December following P. F. sold to W. F., conveyed to him the equity of redemption, and procured M. to assign to W. F. his mortgage, and convey to him the legal estate. In March, 1877, W. F. mortgaged the land to a Loan Company, but did not assign the M. mortgage, and subsequently the plaintiffs filed a bill seeking to have the charge for their maintenance enforced against the mortgage estate.

Held (reversing the finding of the Master at Hamilton), that the Loan Company were, under the circumstances, entitled to priority over the plaintiffs to the extent of the amount secured by M.'s mortgage.

J. V. Teetzel, for plaintiff.
F. B. Robertson, for defendant.

Boyd, C.] [June 1.

COURT V. HOLLAND.

Mortgagor and mortgagee—Assignment of mortgage subject to equities—Occupation rent—Puisne incumbrancer.

A mortgagor and mortgagee dealt together for some years without having had any settle-

ment of accounts, and the former became insolvent. At the date of the insolvency there existed a right of set-off, in favor of the mortgagor for a balance due him on their general dealings.

Held,—affirming the finding of the Master—that such right of set-off passed to the official assignee of the mortgagor, and that a transferee of the security took it subject to the equity.

As between mortgagor and mortgagee, there is nothing to prevent the mortgagee taking possession at a fair and reasonable rent agreed upon between them. In such a case the mortgagee is not a "mortgagee in possession" in the technical sense of the term.

In such a case, however, a subsequent incumbrancer—prior to the first mortgagee, entering into such possession—is not bound by such an arrangement; and the Master may charge the first mortgagee with a fair occupation rent although it exceeds that stipulated for.

J. Maclennan, Q.C., for plaintiff.

G. M. Ray for defendant.

Proudfoot, V. C.] [June 11.

ROBLIN v. ROBLIN.

Marriage when one party intoxicated—Conspiracy to procure a marriage—Subsequent acknowledgment of validity of marriage—Alimony—Undertaking to receive wife—Costs.

In order to render void a marriage, otherwise valid, on the ground that the man was intoxicated, it must be shown that there was such a state of intoxication as to deprive him of all sense and volition, and to render him incapable of understanding what he was about.

Semble—A combination amongst persons friendly to a woman to induce a man to consent to marry her, it not being shown that she had done anything to procure her friends to do any improper act in order to bring about the consent, would not avoid the marriage.

A marriage entered into while the man is so intoxicated as to be incapable of understanding what he is about, is voidable only, and may be ratified and confirmed.

Three years after the ceremony of marriage which the man alleged he was induced to enter into while under arrest and intoxicated, an action at law was brought against him for necessaries furnished to the woman, and for expenses for the burial of her child in which the question of the validity of the marriage was distinctly put in issue, the man signed a memorandum, endorsed on the record in which he admitted the existence and validity of the mariage, and consented to a verdict for the plaintiff in the action.

Held,—That if the marriage was previously voidable it was thereby confirmed.

In a suit by the woman for alimony brought eighteen years after the marriage on the ground of refusal by the man to receive her, he set up the invalidity of the marriage; but while under examination stated that if it was determined that she was his wife he would receive her as such; the Court (Proudfoot, V.C.) while finding there was a valid marriage, decreed that upon the defendant undertaking to receive the plaintiff as his wife, the bill should be dismissed, but ordered the defendant to pay the costs between solicitor and client.

C. Moss, for plaintiff.

Walbridge, Q.C., and *S. H. Blake*, Q.C., for defendant.

Spragge, C. J. O.*] [June 11.

JESSUP v. GRAND TRUNK RAILWAY CO.

Railway Co.—Land acquired on condition of using it for station.—"Place," meaning of.

The plaintiff being the owner of a tract of land near Prescott, on the 29th of October, 1869, agreed with the contractors engaged in the laying out of the railway of the defendants, and in acquiring lands and rights of way for the construction thereof, that in consideration of their placing the station of the railway for Prescott upon his land, to convey to the contractors, their heirs, &c., six acres of such land for that purpose, and, if necessary, for the purposes of such station, to allow them to take an additional quantity, not exceeding in all ten acres. The station was erected in 1855 on the said lands, and used by the company until 1864 when it was closed, and a station selected about 1½ miles from the plaintiff's lands, and station buildings erected thereon, in consequence of which the plaintiff's remaining lands became greatly depreciated in value.

* These cases were heard by the present Chief Justice Ontario whilst Chancellor.

Held, that under the circumstances, and considering, amongst other things, that the plaintiff would derive a permanent advantage from the station being retained permanently on the lands conveyed by him, and which he had granted in fee, instead of simply giving the company a right of way, the words in italics had been used in a sense indicating permanancy, the consideration for the conveyance would not be performed by merely erecting the station, and afterwards removing it at the pleasure of the company.

In such a case the Court (SPRAGGE, C.) considered that the plaintiff would be entitled to a decree, referring it to the Master to inquire as to damages, or directing a restitution of the lands, if they were not again used by the company for the purpose for which they had been conveyed to them.

It appearing in the case that the company had, since the institution of this suit, re-occupied the lands for the purposes of the station, that fact was to be recited in the decree, and leave reserved to the plaintiff to move in the cause should the company subsequently discontinue the use of these lands for their station.

Bethune, Q. C., for plaintiff.
W. Cassels, for defendants.

PETERKIN V. MACFARLANE.

Notice of title.

The rule laid down in *Barnhart* v. *Greenshields*, 9 Moore, P. C. 36, that a purchaser of lands is not bound to attend to vague rumors, or to statements by mere strangers, but that a notice to be binding must be given by some person interested in the estate, has not been strictly observed in this country.

When a purchaser has such notice as to affect his conscience, so as to make it inequitable in him to purchase, and take and register a conveyance to himself, having at the same time knowledge that its effect would be, if allowed to stand, to defeat a title known by him to exist in another, his conveyance will not be allowed to prevail against such title.

Boyd, Q.C., for plaintiff.
Moss, for defendant.

COLLARD V. BENNETT.

Fraudulent conveyance—Husband and wife—Statute of Elizabeth.

The defendant B., who was carrying on a thriving business, and possessed of personal property to the value of about $1,000, his debts not exceeding half that sum, in 1876 bought some land which he had conveyed to his wife, who had been instrumental in increasing the earnings of her husband. It was shown that all debts due by B. at the time of the settlement had been paid before the institution of this suit by the plaintiff, whose debt had accrued after this conveyance.

Held, under the circumstances, that the plaintiff was not in a position to impeach the conveyance, as it had not been made with a view of placing the property beyond the reach of future creditors.

In 1877, B. being in difficulties, could not obtain credit. In 1878 the debt to the plaintiff was contracted, and in the same year B. made additions to the house on the land, which he paid for.

Held, that in this respect the case came within the principle of *Jackson* v. *Bowman*, 14 Gr. 156.

Bethune, Q.C., for plaintiff.
W. Cassels, for defendant.

JOHNSTON V. REID.

Consolidation of mortgages—Valuable consideration.

The rule that a mortgage shall not be redeemed in respect of one mortgage, without being redeemed also as to another mortgage of the same mortgagee's, applies as well in a suit to purchase as to redeem.

In such a case the property embraced in one mortgage realized more than sufficient to discharge such mortgage. The plaintiff, having obtained execution against the lands of the mortgagor, took a mortgage on the lands comprised in the other mortgage of the defendant, which was registered after it, but without notice thereof.

Held, (1) that the defendant had not the right, as against the plaintiff, to consolidate his mortgages, and make good the loss on the second, out of the surplus on the first sale, the policy

of the Registry Act being to give no effect to hidden equities. (2) That by taking a mortgage, and thus giving time to the mortgagor, the plaintiff, an execution creditor, was a holder of his mortgage for value.

Bethune, Q.C., for plaintiff.

W. Cassels, for defendant.

REPORTS.

IN THE COUNTY COURT OF SIMCOE.

SUMMERFELDT V. NEELANDS.

Costs—Setting aside judgment—Reasonable time.

Writ issued on 11th March, 1879; served on 5th May, 1879. The plaintiff never declared. On the 2nd of March, 1881, notice was served on the plaintiff's attorney by the defendant's attorney of the latter's intention after the lapse of the then ensuing term to sign judgment of *non pros.* In pursuance of this notice the defendant did on the 14th of April, 1881, sign judgment for his costs, and wrote a letter on the same day notifying the plaintiff's attorney that he would issue execution within a week, if the costs were not sooner paid. This letter was received on the 16th of April, and was the first intimation the plaintiff had of the judgment being signed. On the 19th of April, the plaintiff obtained a summons to set aside the judgment on the grounds that the plaintiff, not having declared within a year from the return day of the summons, was out of court (sec. 93, C. L. P. Act, R. S. O. Cap. 50), and that a proper notice had not been given, a notice to declare within eight days being necessary under sec. 94.

The defendant maintained *first:* that although under sec. 93 the plaintiff was out of court, yet the defendant was not, and the section did not exclude the defendant from signing judgment for his costs even after the expiration of the year from the day summons was returnable, and *secondly:* that the plaintiff was too late in his application.

In support of the summons was cited Chitty's Archbold, 10 Ed. pages 203 and 1409, to, and Chitty's Forms, 7 Ed. p. 95.

To the second contention it was urged that irregularities have only to be moved against within a *reasonable time*, and before another step has been taken by the party applying, (106 Reg. Gen. Trinity Term 20 Vict.) and in this case a reasonable time had not elapsed because knowledge of the signing of judgment had only been obtained on the 16th of April, the 15th being Good Friday. The 17th was Sunday, and the 18th Easter Monday, so that in reality the plaintiff had applied on the second day after the receipt of notice. And in any event, counting from the 14th to the 19th, there would only be five days, which was a reasonable time within which to move (Harrison's C. L. P. Act, page 52).

ARDAGH J. J. held that upon the authority of *Cooper* v. *Nias* 3 B. A. 271, the judgment must be set aside, but that the plaintiff had not applied within such a reasonable time as to entitle him to costs, notwithstanding cases referred to in Harrison's C. L. P. A. 52.

(Note by Editor C. L. J.)

There is no point on which Judges are so liable to be misunderstood as that which relates to the giving or refusing costs. A Judge may express an opinion on some point, which opinion, though not given directly as the reason, is nevertheless at once set down as that assigned for granting or refusing costs. In this case the point, is we think, a new one, and we can well understand the Judge making the summons absolute without costs.

LAW STUDENTS' DEPARTMENT.

EXAMINATION QUESTIONS.

FIRST INTERMEDIATE.

Mercantile Law, &c.

1. A. makes an offer to "B." by letter dated 26th April, 1881, to sell him goods enumerated therein for the price of $200. B. receives the letter on the 27th, and writes and posts a letter accepting the offer on the 29th, and immediately thereafter receives a letter which had been written by A. on the 28th, rescinding his offer. State accurately the rights of the parties.

2. Give a short statement of the law in regard to a wife's power to bind her husband by contract.

3. "Persons may stand in the position of partners as to third persons without being partners *inter se*." Explain and illustrate this assertion.

4. A promissory note made by A., payable three months after date at the Canadian Bank of Commerce in Toronto, to the order of B., and endorsed by him to C., is not paid at maturity. State fully and accurately the rights of C. against A. and B. respectively, showing what C. must *necessarily* do to enforce such rights, giving reasons for your answer.

5. What are the necessities of a contract to answer for the debt, default, or miscarriage of another person in order that such contracts may be enforced? Give reasons for your answer in full.

6. State the common law rules as to appropriation of payments by a debtor to his creditor.

FIRST INTERMEDIATE.

Smith's Common Law—O'Sullivan's Manual.

(HONORS.)

1. How was Canada acquired by Great Britain? What laws prevailed and what constitutional changes were made up to the meeting of the first legislature of the Provinces? Answer briefly.

2. What do you understand by *hearsay evidence?* Upon what reasoning is the rule supported, that as a general thing hearsay evidence is inadmissible. Are there any exceptions to the rule? Answer fully.

3. A. ships a quantity of goods from Hamilton to Port Hope by the Great Western, and pays them the freight over the whole distance, and they give him a bill of lading. The goods are damaged while on the Grand Trunk Railway between Toronto and Port Hope. Against whom are A.'s remedies, and why?

3. A., driving on the street is, through the gross negligence of C., injured. A. subsequenly dies. What was the rule of Common law, and how has the rule been varied by Statute as to the right of his representatives to bring an action for damages against B.?

5. Discuss briefly how far a master is responsible for the torts of his servant?

6. A. went into a grocery and said to the grocer, "Let B. have the $10 worth of groceries he was asking you for, and if he does not pay you for them, I will." B. afterwards failed to pay the grocer. Would A. be liable? Give your reasons for your answer.

SECOND INTERMEDIATE.

Leith's Blackstone—Greenwood on Conveyancing.

(HONORS).

1. What do you understand by title by purchase? Is the estate of X. in the following examples one acquired by purchase: (1) A. gave land to X. and the heirs of his body, (2) A. granted land to B. and the heirs of his body, one of whom X., took the land on B.'s death, (3) A. devised land to X., who was his heir-at-law.

2. Land is granted to the use of A. and the heirs of his body, but if B. should return from Rome within three years then to B. in fee. Is there any method by which B.'s remainder may be defeated? Explain.

3. Are there special characteristics of a conveyance by which an entail is barred? Explain.

4. A married woman was the owner in fee of Blackacre and in tail of Whiteacre. She joined with her husband in a mortgage of both which was afterwards paid off. Who is entitled to the lands, and for what estate? Explain.

5. Certain trusts are to be declared by a marriage settlement, and the settlor wishes to retain power to cancel these or control them after the consummation of the marriage. How can his desire be effectuated?

6. By what means were the numerous ancient tenures reduced to the tenure by which lands are held in Ontario? Answer fully.

7. Is there any right (1) to dower, or (2) to curtesy out of equitable estate? If so what is the limit of the right?

Broom—Books III. and IV. Underhill on Torts, &c.

(HONORS.)

1. What are the remedies severally at law and in equity for a public nuisance, and a private nuisance?

2. What are the requisites to establish the injury of false imprisonment? Under what circumstances would such an action lie against a Justice of the Peace.

3. A. goes into a public house and after remaining till closing hours, refuses to leave at the request of the proprietor, is he liable to any and what action, and upon what principle?

4. How far and in what cases is the plea of duress a ground of defence on a criminal trial?

5. A., a police officer, having a warrant for the arrest of B., on a charge amounting to misdemeanor, meets him in the highway, B. resists arrest and runs away, and in the pursuit A. fires his pistol after B. and kills him. Is A. liable to indictment for any, and if any, what offence?

6. Under what circumstances may a man finding *lost* goods and appropriating them to his own use, be indicted for larceny?

EXAMINATION FOR CALL.

Dart's vendors and purchasers—Walkem on wills—Statutes.

1. A testator devised Whiteacre to X. conditionally upon his executors completing the purchase of Blackacre (which in that event was to go along with Whiteacre) within a specified period; but in case the executors "should not be able" to purchase Blackacre then Whiteacre was to go to R. The executors, although "able," neglected to complete the purchase. What are the rights of the respective parties?

2. A vendor sells an estate "with all faults." Can he in all cases enforce specific performance? Explain fully.

3. Does a vendor's solicitor incur any liability by inducing the purchaser through misrepresentation to accept a defective title? Answer fully.

4. What is the rule as to the concealment of advantages connected with the estate by the purchaser from the vendor?

5. At a sale the auctioneer made certain verbal alterations in the conditions of sale. In what condition is the purchaser as to (1) enforcing, and (2) defeating a bill for specific performance with the variation?

6. A testator devises land to A., and if he should die without leaving issue, then to B. What estate does A. take? Explain and mention any recent change in the law.

7. A testator by his will directs all his debts to be paid out of his personal estate; devises Whiteacre to B. upon which is a mortgage, which the testator has covenanted to pay, and gives the residue of his estate to C. By whom must the mortgage be paid? Give your reason.

8. Land was conveyed to a trustee in fee, and the legal estate vested in him for a purpose which has been accomplished. The trustee dies. In whom does the legal estate vest? Explain.

Equity Jurisprudence.

1. Give illustrations of constructive fraud arising from peculiar fiduciary relations.

2. Give some general rules which illustrate the construction which Courts of Equity have adopted in the case of wills, by a departure from the literal and grammatical import of the words used in the will, in order to give effect to the intention of the testator.

3. Explain and illustrate the doctrines of set-off as administered in equity.

4. Define a trust, and give Lord Coke's description of a use and trust in land.

5. When the personal estate out of which pecuniary legatees are to be paid has been exhausted by creditors, out of what assets and as against what parties are such legatees entitled to be paid?

6. Explain and illustrate what is meant by "remoteness" as affecting a devise under a will?

7. What is the rule with respect to notice to the counsel or solicitor being notice to the client?

8. State in what cases the statute of limitations cannot be pleaded as a defence.

9. Devise of lands in trust for sale and out of the proceeds to pay debts; after payment of debts in full there is a surplus. Who is entitled to it?

10. Has the Court of Chancery at present any jurisdiction to grant relief by way of Mandamus, Prohibition or *Quo Warranto*? Explain fully.

CERTIFICATE OF FITNESS.

Smith's mercantile law—Common law pleading and practice—The statute law.

1. Give a short sketch of the history of English Commercial Law.

2. To what extent will a Court of Equity in-

terfere to examine and adjust the accounts of partners between themselves? Answer fully.

3. What method is provided by statute whereby a person interested in the profits of a partnership concern can limit his liability for the partnership debts? Answer fully.

4. Define what is meant by a Joint Stock Company, and indicate the various ways which they may be formed.

5. In how far is a principal liable for the *negligence* of his agent? Answer fully, giving illustrations.

6. Give a short sketch of the respective rights of mortgagor and mortgagee of a British ship.

7. A payee of a promissory note for $500 given by the maker in consideration of $250 lent and a further illegal consideration, gives you the note with instructions to collect from the maker. How would you advise him to act in the matter, and why?

8. Point out, as fully as you can, the duties imposed upon a merchant who has taken a ship to freight.

9. Give the chief judicial decisions upon that portion of the 4th section of the Statute of Frauds which relates to answering for the debt, default, or miscarriage of another.

10. Define a *lien* and point out the various ways in which a lien may be lost. Answer fully.

CORRESPONDENCE.

"*Finals.*"

To the Editor of the CANADA LAW JOURNAL:—

SIR,—Will you kindly permit me, through the medium of your columns, to suggest to the Benchers the expediency of speedily informing those students who intend to present themselves for their final examination in August next, whether "by pleading and practice of the Courts" will be understood the present practice, or the practice under the Judicature Act?

For my own part, and I dare say other students would support my view, I would (provided timely notice were given) far rather prepare myself to pass an examination in the provisions of the Judicature Act, than spend somewhat futile labor in reviewing and adding to my knowledge of the C. L. Proc. Act, and the expiring practice. With the help of the annotated editions of the Judicature Act already in print, and reviewed in your last number, we should be enabled to gain a fair acquaintance with the new practice before August.

At all events, I would respectfully suggest to the Benchers to issue some order on the subject.

Your obedient servant,

IGNOTUS.

Alleged Errors in the Judicature Act.

To the Editor of the LAW JOURNAL.

SIR,—I observe in your issue of May 1st, some "points" noted from the advanced sheets of Messrs. Taylor & Ewart's forthcoming book on this subject. If you assumed these "points" to be reliable it is no wonder you expressed a fear that "other" mistakes and difficulties would be discovered in the Statute, and when the learned critic, cheered by your assurance, set to work to find some more "points," I was not surprised to see in your June number another crop of them.

I won't trouble you this time with more than a few of the absurd blunders which any one who reads the Statute and Rules will find the critic's "points" to be.

They say "A Divisional Court is one of the Common Law Courts, or the Court of Chancery, with their present quota of three Judges, yet in Sec. 29, s. s. 3, a Divisional Court shall be constituted by 'two or three *and no more*' of the Judges thereof."

I beg leave to say this is wrong. The Divisions of the High Court of Justice, the Q. B. Division, the C. P. Division, the Chancery Division are not what either the English or Ontario Statute means at all by "Divisional Courts," and he misquotes the language of the Section, when he says, "A Divisional Court shall be constituted by two or three *and no more* of the Judges thereof," *i. e.* of the Divisional Court. The Act does not say "two or three and no more" of the Judges of the Divisional Court, but "two or three and no more" of the Judges of the High Court. It provides that any number of such Divisional Courts may sit at the same time; and the Divisional Court need not have a single Judge who is attached to the particular Division of the High Court in which the suit brought before the Divisional Court was brought. It is only where "found practicable and convenient," that a Divisional Court is to include one or more Judges so attached to the Division. See Sec.

30. The High Court has nine Judges : a Divisional Court is to be composed of "two or three and no more" of these. So also there may be two Divisional Courts of the Court of Appeal (Sec. 42.)

Could a hostile critic hunting for "points" against a Legislative measure fall into a stranger misconception than this ?

Another "point" is that Order 9, Rule 6, does not make provision for being acted upon in case of an acceptance of service and undertaking to appear. Did the writer overlook, that by the express provision of, Order 6. Rule 1, "no service of writ shall be required, where the defendant by his solicitor accepts service and undertakes to enter an appearance ?"

Again it is asked under Order 9, Rule 6, "Has a statement of claim to be delivered or not?" and he says the Rule has it both ways. It is quite clear that such a statement of claim has not to be delivered, and that the Rule does not give it "both ways.". The Rule expressly declares that no "statement of claim need afterwards be delivered." The critic confounds the "statement of claim," which is a pleading, and the same as the "declaration" at law, or the "Bill" in Chancery, with what (following the English Rule) is described as a "statement of the particulars" of the plaintiffs claim. No pleading is to be delivered, but a "statement of particulars" is to be both filed and served.

Another "mare's nest" which has been discovered is that Section 62 specifies what the accountants duties shall be, while, he says, since 26 June 1876, there has been no such officer. If he look at the Chancery Act R. S. O. c. 40 s. 8 he will see that there is an express provision for an accountant, and this has never been repealed. No appointment of a separate Officer as an accountant has been made since the late Mr. Buell ceased to hold the Office, and in consequence of this the Court by the orders 625,626, assigned to the Referee in Chambers what had theretofore been the duties of the Accountant. The Judicature Act, order 56, rule 5, appoints the Registrar of the Court of Chancery to be the accountant "until, and unless some other person is appointed accountant of the Supreme Court."

The critic enquires "Are the Referee in Chambers, and Mr. Dalton to continue to discharge their judicial functions or be superseded by the Master in Chambers ?" The 62nd sec. of the act continues to all officers their present judicial and other powers "Subject to any rules of Court." By one of the Rules (420) the Master in Chambers is to have "the power, authority, and jurisdiction theretofore are like cases possessed" by the Clerk of the Crown, and Pleas of the Court of Queen's Bench, and by the Referee in Chambers of the Court of Chancery.

The critic does not understand the part of Order 36, Rule 8, which he quotes, as is evident from his punctuation. Let him read it as follows, and perhaps he will see what it means :—"Any such application may be made by motion as soon as the right of the party applying, to the relief claimed, has appeared from the pleadings."

Again it is said, "Order 46, Rule 4, section 17, should be section 19." Section 17 is right. Let the writer look at the authorized issue of the statutes, and he will see his mistake.

Probably there are oversights in the statute, clerical mistakes, and oversights in substance, which will no doubt be discovered from time to time in the practical working of the new system. but it seems strange that Mr. Taylor and his assistants were so unfortunate as not to find them, though it appears they have zealously devoted themselves to the task. I think any one who will take the trouble to consider these "points" thus brought before the public, will see that they do not show the learning and acumen of the authors.

SCRUTATOR.

Defaulting Attorneys.

To the Editor of the CANADA LAW JOURNAL.—

DEAR SIR,—I have for some years past thought it very unfair to a large body of practising solicitors and attorneys in this Province, that when an application is made against one of their number, it should virtually involve a charge against the whole profession. The large proportion of our profession never have had an application made against them by a client, but, from the mode in which these matters are reported to the public, the words "Re A. B. a Solicitor," may cover the most honorable member of our honorable profession. It is but fair that each man should bear his own sins, and that men thus sinning should be known, and not that the whole body should have odium cast upon it by the irregularities of a small number of dishonest men, who are false to the oath they took when they were admitted to practise. Let the name of the sinner be known. It is but due to the public and ourselves that this should be so. Being warned of the defaulter, it is not our fault if he be trusted again.

Yours truly,

SOLICITOR.

June 16th, 1881.

OTTAWA CORRESPONDENCE.

We are glad to hear again from our correspondent at Ottawa, who, in April last, spoke of the legislation of the session :—

"I see some cases in recent numbers of your journal turning on the jurisdiction of Division Courts in cases where it depends on the amount, always a difficult question, as a mere trifle may give or take away the jurisdiction, and this in higher Courts as well as lower. The Supreme Court, in the case of *Levi* v. *Reed*, had a rather hard point to decide. The action in the Superior Court was for slander. Levi got judgment (without a jury) for $1,000 damages, and costs. Reed appealed, and the Queen's Bench in appeal, reduced the damages to $500. Levi appealed to the Supreme Court, praying that the judgment in appeal might be reversed, and that of the Superior Court restored, asking for the $1,000, and no more, and the Court could not (by the Quebec law at any rate) give him more than he asked for. The Judges agreed that the costs could not be counted as part of the sum demanded, and if they could have been they were under $1,000; consequently Reed, being content to abide by the judgment of the Queen's Bench and pay the $500 damages, and the Statute 42 Vict., cap. 39, s. 8, providing that there should be no appeal in any case "wherein the matter in controversy does not amount to the sum or value of $2,000," unless in cases where the rights in future may be bound (which they could not be in this case), or the validity of an act is called in question, it would seem that there was not jurisdiction. Yet the Court, on the exception to the jurisdiction maintained the latter, giving judgment for the $1000 and costs. Taschereau, J. dissented, and I think he was right. You will see the case in the Reports. The matter in controversy was really only $500: Reed declaring himself ready to pay *that* and Levi only asking $1000. There was a case mentioned by the judges who gave the judgment (*Hart* v. *Joyce*), on which they relied but it does not seem quite in point, for the Court *might* have given a judgment exceeding $2000 in amount as against the party losing: and in that case there seems to have been a difference of opinion among the judges: it was the former Taschereau, J. not the present, who joined in it, as I understand. The case was a strong one against Reed, but that does not alter the law. Will Mr. Mowat's new Act avoid the difficulty as to Ontario cases?

I liked the look of my little squib about the "innocents" as you put it It took off the stiffness of Wig and Gown, and recalled something of the time when :—

"The grave Lord Keeper led the brawls,
And Mace and Goldstick danced before him"

in the days of good Queen Bess, I suppose.

How do you like the changes in the Government? All seem to think Sir Alex. Campbell the best man for the Portfolio of Justice.

We have the Orders in Council and the Public General Acts printed off, and the Local and Private well advanced.

Dr. Todd is here with his LL.D., and his C. M. G. He won them well and may he wear them long.

BOOKS RECEIVED.

THE LAW OF REGISTRATION OF TITLES IN ONTARIO, by Edward H. Tiffany, of Osgoode Hall, Barrister-at-Law. Carswell & Co., Law Publishers, Toronto. 1881.

THE LAW OF THE ROAD; OR, THE WRONGS AND RIGHTS OF A TRAVELLER. (English edition.) Carswell & Co., 11 St. Giles St., Edinburgh. 1881.

FLOTSAM & JETSAM.

A COMPETENT JUROR.—Lawyer—Have you any fixed opinion about any thing? Juror—No. Lawyer—Is your mind so porous that it can leach out all past facts, memory, impression and sense of justice? Juror—It can. Lawyer—Would you acknowledge on due evidence that you were not yourself, but somebody else? Juror—I would. Lawyer—Are you sure, without due legal proof, that it is I who am speaking to you now? Juror—I am not. Lawyer—You assume that this i he year 1881 A.D., but you are open to the conviction, on due and sufficient evidence, that it may be 1881 B.C., do you not? Juror—I does. Lawyer—You are of the masculine gender? Juror—I am. But on due and sufficient evidence being produced you would even in this respect be prepared to admit you were mistaken? Juror—I might. Lawyer—Swear this gentleman. He is the juror we long have sought and mourned because we found him not.—*Graphic* (N.Y.)

The honor of Knighthood has not been confined to the Chief Justice of this the "brightest gem" in the Queen's Crown. It was also recently conferred on Charles Lilley, Esq., Chief Justice of Queensland; James Prendergast, Esq., Chief Justice of New Zealand; and John Gorrie, Esq., Chief Justice of Fiji.

Law Society of Upper Canada.

OSGOODE HALL.

EASTER TERM, 44TH VICT.

During this Term the following gentlemen were called to the degree of Barrister-at-Law:—

George Bell, with honors; John O'Meara, Charles Henry Connor, George Macdonald, John Birnie, jr., Charles Egerton Macdonald, Howard Jennings Duncan, Stewart Campbell Johnston, Lendrum McMeans, William Boston Towers, Francis Edward Galbraith, Charles Wright, John Kelley Dowsby, Chas. Herbert Allen, Charles Elwin Seymour Radcliffe, James Leland Darling, John Clark Eccles, George William Baker, Hedley Vicars Knight, George Ritchie.

(The names are placed in the order of merit).

And the following gentlemen were admitted into the Society as Students-at-Law, namely:—

GRADUATES.

Adam Carruthers, B.A., James Alexander Hutchins, B.A., George Frederick Lawson.

MATRICULANTS OF UNIVERSITIES.

John L. Peters, Morris Johnson Fletcher, Francis Cockburn Powell, Toronto University.

JUNIOR CLASS.

Herbert Gordon Macbeth, Alson Alexander Fisher, William Edward Sheridan Knowles, Thomas Hobson, Robert Alexander Dickson, Peter D. Cunningham, Alexander McLean, William Thomas McMullen, Miron Ardon Everttts, William John McWhinney, Richard Armstrong, Alexander Duncan McLaren, Edward Corrigan Emery, John Craine, Joseph McKenzie Rogers, W. Arthur Ernest Kennedy, Geo. Herbert Stephenson, Arthur W. Wilkin, Walter George Fisher.

And the examination of William Scrobie Beale was allowed him as an Articled Clerk.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

Articled Clerks.

1881.
- Ovid, Fasti, B. I., vv. 1-300; or,
- Virgil, Æneid, B. II., vv. 1-317.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History—Queen Anne to George III.
- Modern Geography—N. America and Europe.
- Elements of Book-keeping.

In 1882, 1883, 1884 and 1885 Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

Students-at-Law.

CLASSICS.

1881.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero in Catilinam, II., III., IV.
- Ovid, Fasti, B. I., vv. 1-300.
- Virgil, Æneid, B. I., vv. 1-304.

1882.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum, (B. G. B. IV. c. 20-36, B. V., c. 8-23.)
- Cicero, Pro Archia.
- Virgil, Æneid, B. II., vv. 1-317.
- Ovid, Heroides, Epistles V. XIII.

1883.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum.
- Cicero, Pro Archia.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Heroides, Epistles V. XIII.

1884.
- Cicero, Cato Major.
- Virgil, Æneid, B. V., vv. 1-361
- Ovid, Fasti, B. I., vv. 1-300.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.

1885.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid, Bb. I., II., III.

ENGLISH.

A Paper on English Grammar.
Composition.
Critical Analysis of a selected Poem :—
1881.—Lady of the Lake, with special reference to Cantos V. and VI.
1882.—The Deserted Village.
The Task, B. III.
1883.—Marmion, with special reference to Cantos V. and VI.
1884.—Elegy in a Country Churchyard.
The Traveller.
1885.—Lady of the Lake, with special reference to Canto V.
The Task, B. V.

HISTORY AND GEOGRAPHY.

English History from William III. to George III., inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek :—

FRENCH.

A paper on Grammar.
Translation from English into French Prose :—
1881.—Emile de Bonnechose, Lazare Hoche.

OR, NATURAL PHILOSOPHY.

Books.—Arnott's Elements of Physics, 7th edition, and Somerville's Physical Geography.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination, to be passed in the third year before the final Examination, shall be :—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery; O'Sullivan's Manual of Government in Canada; the Dominion and Ontario Statutes relating to Bills of Exchange and Promissory Notes, and Cap. 117, R. S. O., and amending Acts.

The Subjects and Books for the Second Intermediate Examination to be passed in the second year before the Final Examination, shall be as follows :—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing, (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law; Underhill on Torts; Caps. 49, 95, 107, 108, and 136 of the R. S. O.

FINAL EXAMINATIONS.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Smith on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Harris's Principles of Law, and Books III. and IV. of Broom's Common Law, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Smith on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

The Primary Examinations for Students-at-Law and Articled Clerks will begin on the Second Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

The Second Intermediate Examination, on the 3rd Tuesday.

The First Intermediate, on the 3rd Thursday.

The Attorneys' Examination, on the Wednesday, and the Barristers' Examinations, on the Thursday before each of the said Terms.

FEES.

Notice Fees	$1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Attorney's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fees	1 00
Fee in Special Cases additional to the above	200 00

The following changes in the Curriculum will take effect at the examination before Hilary Term, 1882:—

FIRST INTERMEDIATE.

Williams on Real Property; Smith's Manual of Common Law; Smith's Manual of Equity; the Act respecting the Court of Chancery; Anson on Contracts; the Canadian Statutes relating to Bills of Exchange and Promissory Notes, and Cap. 117 R.S.O. and Amending Acts.

SECOND INTERMEDIATE.

Leith's Blackstone (2nd edition); Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages and Wills); Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act; Caps. 95, 107 and 130 of the Revised Statutes of Ontario.

FOR CERTIFICATE OF FITNESS.

Taylor on Titles; Hawkins on Wills; Taylor's Equity Jurisprudence; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and the Pleadings and Practice of the Courts.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's Principles of Criminal Law, and Books III. and IV. of Broom's Common Law; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills; the Statute Law and the Pleadings and Practice of the Courts.

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DIARY FOR JULY.

1. Fri...Long vacation begins. Dominion day.
3. Sun...*3rd Sunday after Trinity.*
4. Mon..County Court Terms (except York) begin. Heir and Dev. sitt. begin.
7. Thurs.Gen. Simcoe first Lieut.-Gov. of U. C., 1792.
8. Fri...Cyprus ceded to England, 1878.
9. Sat...County Court Term ends.
10. Sun...*4th Sunday after Trinity.*
11. Mon..Canada invaded by U. S., 1813.
14. Thurs.W. P. Howland, first Lieut.-Gov. of Ontario, 1868.
15. Fri...Manitoba entered Confederation, 1870.
17. Sun...*5th Sunday after Trinity.*
19. Tue..Heir and Devise sittings end.
20. Wed..British Columbia entered Confederation, 1871.
23. Sat...Union of Upper and Lower Canada, 1840.
24. Sun...*6th Sunday after Trinity.* Canada discovered by Cartier, 1534.
25. Mon..Battle of Lundy's Lane, 1813.
26. Tue..Jews first admitted to Ho. of Commons, 1858. Dr. Robitaille, Lieut.-Gov. of Quebec, 1879.
29. Fri...First Atlantic Telegraph laid, 1866.
30. Sat...Governm't of U.C. removed from Niagara to York, 1793.
31. Sun ...*7th Sunday after Trinity.*

TORONTO JULY 1, 1881.

SIR W. M. JAMES, Lord Justice of Appeal in England, died on the 7th ult., at the age of 74. He had a high reputation as a judge, and he will be a great loss to the Bench.

A CORRESPONDENT in our last issue took exception to the practice which prevails in reporting applications made by clients against and solicitors, not to mention the attorneys name of the delinquent. Our reporters have, so far, followed the rule which has time out of mind prevailed in England. Whilst this course is merciful to the few, it is unjust to the many, as is forcibly set forth by "Solicitor." The fear of notoriety being given to the dishonest act of an attorney, causing a wholesome horror of his name being handed down to posterity in an unenviable light, would, moreover, be a strong deterrent against improper conduct. As at present advised we shall act on the suggestion of our correspondent.

OUR REPORTS.

The letter of "Barrister" (on page 277) draws attention to a matter which has often been spoken of in professional circles, and must sooner or later receive a larger share of attention. The points taken are, that many important and valuable decisions are given wherein no written judgments are prepared; that these decisions are not as a rule reported, and that the reporters are derelict in their duty in not reporting or noting them.

As to what our correspondent says about judgments rendered immediately cases are heard, there is not only great advantage to suitors in this practice (we speak especially with reference to judgments of first instance) but it is rapidly becoming a matter of necessity to the judges. In England it is the rule, and written judgments are the exception. We should not have thought that the number of unwritten judgments are at present so many as our correspondent would seem to think, though we admit he has good opportunties of judging; but they will probably become more and more common, and it follows, if we are to have complete reports, that *viva voce* judgments must be reported. It does not follow, however, that it would be fair to ask the present staff of reporters with their present salaries to do the extra work that this would involve. If the salaries of the reporters were reasonable under the then state of things, they would be insufficient with a larger number of

cases to report, and when, instead of the comparatively simple task of putting in shape a written judgment, wherein the judge gives (as is sometimes the case, though less frequently than it used to be) the facts and arguments, as well as his own views and decision, the reporter has to get the complete facts partly from the papers filed, and partly from the counsel, as well as note the judge's remarks as best he may. There is no question as to what *ought* to be done, and what must eventually be done—it is now well done in England—but we do not think the present staff of reporters should be called upon to do more work without increased remuneration. As it is, their time is pretty well occupied and their official duties militate strongly against the obtaining or satisfactorily performing ordinary professional work. In England, of course, this is not so, as the reporters are always barristers who are not expected, as a lawyer here is, to remain most of the day in his office.

Much more could be said in reference to this matter but we shall not pursue it further at present. We gladly however make public part of a recent statement of the Committee of the Benchers on reporting. Their words are as follows:—

"The Committee have great satisfaction in stating that never before has the reporting been so well up in all the courts as at present, and it is hardly possible to expect greater despatch or promptitude than are now used in placing the decisions of the courts in the hands of the profession."

The position of a reporter is generally a thankless one; the work is wearying and there is more labour about it than many are aware of. Our reporters may have their faults, but we know by practical experience the difficulties and unsatisfactory nature of the position; we have therefore all the more pleasure in publishing the report of this Committee—one of the most efficient committees, by the way, of the Society.

MORTGAGES ON UNPLANTED CROPS.

The wisdom of sustaining mortgages on crops to be sown, from a limited commercial consideration, may fairly be questioned; but, viewed from a farmer's point of interest, the desirability of upholding such securities goes without question. In agricultural countries, where so much depends upon the harvest, it is of paramount importance to a people, that the farmer should have preserved to him those resources and facilities of which he may be deprived by the uncontrollable failure of a season. That the farmer, upon whose skill and labour so much depends, is the first to gain or lose, relatively to his facilities for production, is an argument for sustaining such securities suggested by sentiment; but to have a preservative, to some extent, against hard times, by mitigating his loss, and sustaining the farmer over one bad season is an argument which commends these securities for unanimous support. No more effective illustration of the law of cause and effect can be had than the certainty with which hard times follow upon bad crops. The one is the necessary consequence of the other, and as positive in its succession as that season follows season. In what follows, therefore, we will discuss the subject of our article, and refer briefly to its history.

In those "good old days," (to use a doubtful aphorism) when law was equity, and the equities always equal, the law prevailed, and equity was as limited and technical in its power, as was the sense in which it was accepted in equity jurisprudence. Law seemed jealous of interference, and equity seemed timid of its more ancient rival; and so the operations of each system were as separate and distinct as are now the principles respectively governing legal and philosophical equity. The disinclination of the two systems to unitedly concentrate towards an acknowledged object, at times produced contrary results, and not unfrequently an-

tagonism; and the governing principles of one system being as little satisfactory as those of the other, in their respective applications, made the maxim, "no wrong without a remedy," extremely problematical. Whereas now, the rule in equity is really the rule in law, (*Lutscher* v. *The Comptoir D'escompte De Paris*, L. R. 1. Q, B. D., 709), formerly the rule in law was not the rule in equity. Then we were taught, *Equitas sequitur legem*," now we believe, *Lex sequitur equitatem*," more properly, perhaps, *Equitas lex est, et lex est equitas.* For this identity we are indebted to the Administration of Justice Act, 1873 (36 Vict. cap. 8, and see *Kennedy* v. *Bown*, 21 Gr. 95), and so the "last hair of Lord Eldon's wig" perished, virtually, by an earlier Act of Mr. Mowat than the new Judicature Bill.

At law, for instance, as a general principle, it was not possible to sell a thing which had no existence (Parsons on Contracts, pp. 522, 523.) "It is a common learning in the law," it has been said, "that a man cannot grant or charge that which he hath not," (Perkins tit. Grants, sec. 65) or as Lord Bacon said, "The law doth not allow of grants, except there be a foundation of interest in the grantor; for the law will not accept of grants of titles, or of things in action, which are imperfect interests: much less will it allow a man to grant or encumber that which is no interest at all but merely future" (see *Lunn* v. *Thornton*, 1 C. B., 379). This impossibility commends itself to reason, for how, it may be asked, can a contract operate upon something which is nothing—*Nemo dat quod non habet.* At law there required to be an actual or potential ownership (*Grantham* v. *Hawley*, Hob. 132), and how could either exist when there was nothing to own; for, even in potential ownership, the article did not exist, the ownership relating to the article granted, and not to that out of or from which the article granted arose or was produced. Thus, for example, the case of actual ownership is illustrated by one being possessed of and granting wool already sheared from his sheep; and the case of potential ownership by the grant of wool to be taken from sheep already his. The latter grant is only sustained because there is a foundation for an interest *in futuro*, which does not exist in possibility only (Lord Ellenborough, C. J., in *Robinson* v. *Macdonnell*, 5 M. & S. 228). When, however, at the time of the grant the thing granted has a potential existence, it would seem the grant was not made inoperative by any limit of time within which the thing granted was to come into existence, for a man could grant all the wool of his sheep for seven years, and the grant was good (Perkins; tit. Grants, § 90).

On the other hand, when there existed neither actual nor potential ownership in the subject matter of the grant, the grant in law was bad, though it must not be forgotten, in the case of non-existing property, that an executory contract might legally be entered into (*Hope* v. *Hayley*, 5 E. & B. 830; *Chidell* v. *Galesworthy*, 6 C. P. N. S. 471), but in respect thereof no bill would lie for specific performance (per Martin B., *Belding* v. *Read*, 3 H. & C. 955.

It is not difficult to see that from this state of the law, the evident intention of parties was often defeated, and so, though a prophetic conveyance without more could not be made, yet such a conveyance was legalized even at law, "*interveniente novo actu*:" but the "*novus actus*" must, without doubt, declare the intention of the parties to be the confirmation of a prior sale; and until some tangible act upon the part of vendor or vendee, acquiesced in by both parties, has been performed, the vendee has but a "*jus ad rem*," and the intervening of the rights of others will be to his prejudice.

Thus, then, at law, things *in posse* were not assignable, but to this rule came the exception, that when the thing assigned had a potential existence, the grant was good, and the further exception in favour of the grant, when

interveniente novo actu, the grant was subsequently confirmed.

But it can no longer be said that in law, apart from the foregoing exceptions, the existence of the subject matter of the grant is requisite to a valid grant thereof. The Courts of Common Law now are vested with the power of applying principles formerly the exclusive privilege of Courts of Equity (*Kennedy* v. *Bown*, 21 Gr. 95), and which, when so applied, prevail (*Lutscher* v. *Comptoir, &c., supra*); and so the lines once drawn between law and equity exist now only in memory.

If, then, equity has put a different construction upon assignments of after-acquired property, the old rule of law becomes practically obsolete, and a knowledge of it practically useless, except, perhaps, upon the legal effect of a *novus actus interveniens*. That equity has done this is undisputed, for universally do equitable doctrines prevail. Of England, Canada, and the States, Massachusetts, Kentucky and Wisconsin alone, continue the Common Law doctrines. (15 Am. L. Review, p. 122; *Jones* v. *Richardson*, 10 Metc. 481; *Rice* v. *Stone*, 1 Allen, 566; *Phelps* v. *Winslow*, 18 B. Monroe 431; *Hunter* v. *Bosworth*, 43 Wis. 583.)

The law (by this we mean the law as modified by equity) will now support assignments, not only of choses in action, and of contingent interest and expectancies, but also of things which have no present, actual, or potential existence whatsoever, but rest on mere possibility (Story's Eq. Juris. sec. 1040); with this proviso, however, that the assignment be "one of that class of which a Court of Equity would decree the specific performance." There yet, however, remains a distinction between things *in esse* and things *in posse*, but only in the spirit in which transfers thereof are respectively sustained. An assignment of the latter is supported, not as a present positive transfer operative *in presenti*, which can only be of things *in esse*, but as a present contract, to take effect and attach *in futuro* so soon as the thing comes into existence (15 Am. L. Review, p. 121; cases cited, note 4). That there are assignments of after-acquired property which the law will not sustain, however decided the intention of the parties may be to pass such property (and this intention must clearly appear by the instrument itself: *Mason* v. *Macdonald* 25 C. P. 439; see *Carr* v. *Allatt*, 27 L. J. Ex. 385), a consideration of the above proviso will fully establish; but whether an assignment of crops to be thereafter grown is one of such class, is now to be considered, while it brings us to the authorities pertaining to the discussion.

In considering the authorities it will no be necessary to go beyond the question, whether the assignment is one of that class of which a Court of Equity would decree the specific performance, because the numerous cases upholding grants of after-acquired property (when there has not been a *novus actus*) so establish their validity, as to make the test thereof the affirmative or negative of this question, (per Lord Westbury, *Holroyd* v. *Marshall*, 33 L. J. Ch'y, N. S. 193; *Re Thirkell, Perrin* v. *Wood*, 21 Gr. 492). Where there has been a *novus actus*, then a grant may yet be good at law, even in cases where equity would not have decreed specific performance but these cases call for no consideration here.

In *Brown* v. *Bateman*, L. R. 2 C. P. 272, Mr. Justice Smith asked whether an agreement "that all materials brought upon the premises by B., for the purpose of erecting the buildings should be considered as immediately attached to, and belonging to the premises and should not be removed without Holledge's consent" was a contract which equity would enforce in favour of Holledge as against a seizure by the Sheriff under an execution against B., and he answered that he clearly was of opinion that it was.

In *Hope* v. *Hayley*, 5 E. & B. 830, the deed contained the words "that when and as soon as any of the dye wares, &c., &c., hereby

assigned shall be used up and consumed, and other dye wares, &c., shall, in the ordinary course of carrying on the said business be purchased, grown or otherwise substituted for them, or any of them, the dye wares, &c., so purchased, grown or otherwise substituted, shall belong to the defendant," and though the judgment of the court proceeded upon the point that there was a subsequent Act abundantly sufficient to satisfy Lord Bacon's rule, still the following language of Crompton J.: "Indeed I myself would go further and should hold that the after-acquired goods were made subject to the trusts, and that it would not have been competent to Routledge to say that the trusts should not be executed," seemed to indicate that, without a *novus actus*, he would have held the after-acquired property to be the defendant's as against the assignees in bankruptcy.

In *Lutscher* v. *The Comptoir D'escompte De Paris*, L. R. 1 Q. B. D,, 709, "The plaintiff was in the habit of receiving goods consigned to him by L. for sale upon commission, and in order to place L. in funds for the purchase of the goods, agreed to allow L. to draw upon him. The documents of title to the goods were hypothecated to the plaintiff to enable him to provide funds to meet the bills so drawn by L. The plaintiff accordingly, and at the request of L,, arranged for the sale of a parcel of goods, to be shipped by a vessel chartered by the buyers, and L., having drawn upon the plaintiff for that purpose, purchased and shipped the goods. The bill of lading was handed to L., but never forwarded to the plaintiff, and L.'s affairs being put in liquidation, the liquidator placed the bill of lading in the hands of the defendants with instructions not to part with it until they were paid the value of the goods, and they accordingly refused to give it up to the plaintiff." It was held that the plaintiff had an equitable right to the bill of lading, and was entitled to sue the defendants for the wrongful detention of it. "I should be sorry," said Cockburn C. J., in his judgment in this case, "if I were obliged to decide in favour of the defendants. The facts appear to be that, before the cargo of palm leaves was shipped, there was a 'specific engagement between the plaintiff and Levy, the consignor, that the goods should be bought with money advanced by the plaintiff, and that the bill of lading should be forwarded to the plaintiff as a security for his advance; and as far as we can see, if Levy had not become bankrupt, the bill of lading would have been forwarded to the plaintiff in due course. Under these circumstances I cannot entertain a shadow of doubt that a Court of Equity would decree specific performance of Levy's agreement. * * * Inasmuch therefore as it is no longer any objection in this court, that the plaintiffs rights are equitable only, I think it is quite clear that he is entitled to judgment."

In *Reeve* v. *Whitmore*, 9 Jur. N. S. 243, the facts were, that in 1859, S., in consideration of an advance, executed a bill of sale, in which H. joined for the purpose of postponing his security (H. was a prior mortgagee,) by which S. assigned to G. all and singular the prepared clay and earth and stock of bricks in and upon the brick field. Lord Westbury on appeal (p. 1214) said: "I think this case has been rightly decided by the Vice-Chancellor, when he declared that the instrument of May, 1859, did not operate or take effect as an equitable assignment of any clay, bricks, and so forth, which were not then on the brick field. I think it did not, because I think there was no present existing contract that, immediately on the execution of the security, the mortgagee should have such right, title and interest with respect to such future property. If there had been such a contract, it would have been an assignment and would have fallen within the principles explained by the House of Lords, in the case of *Holroyd* v. *Marshall*. I think there can be no doubt on the authorities, that a mortgagee can effectually charge after-acquired property; and although at law

it may be necessary to have the *novus actus;* in equity, when the property comes into the possession of the mortgagor, it is at once operated upon by the instrument and is effectually charged as against a subsequent assignee or a judgment creditor. But there remains the further question whether the goods in dispute *were of a specific character* so as to bring them within the rule laid down in *Holroyd* v. *Marshall.*"

In *Belding* v. *Read*, 3 H. & C. 955, the after-acquired property had not been specifically ascertained within the principle of *Holroyd* v. *Marshall*, and in *Holroyd* v. *Marshall* there was apparently a *novus actus*, but yet the assignment was one of that character wherein the court would grant specific performance.

The case of *Lazarus* v. *Andrade*,* L. R. 5 C. P. D. 318. (see also *Leatham* v. *Amor*, 47 L. J. Q. B. 581.) following long after *Re Thirkell*, *Perrin* v. *Wood*, in our courts presents the self same features and furnishes the self same legal results. Lopes J., in his judgment, said: "The principle deducible from decisions, is, that property to be after-acquired if described so as to be identified, may be, not only in equity, but also at law, the subject matter of a valid assignment for value. The contract must be one which a Court of Equity would specifically enforce * * * In this case the property is to be brought into the premises or to be appropriated to the use thereof, either in addition to, or in substitution for the property then on the premises. I think the assignment sufficiently specific, the property in question having become specific by being brought on to the premises in addition to or in substitution for property mentioned in the schedule. *

In *Howell* v. *Coupland*, (L. R. 1 Q. B. D. 258: (see also *Taylor* v. *Caldwell*, 3 B. & S. 826: *Appleby* v. *Meyers*, L. R. 2 C. P. 651) the defendant in March agreed to sell to plaintiff "200 tons of regent potatoes, grown on land belonging to defendant in W., at £3 10s. per ton, to be delivered in September or October, and paid for as taken away." In March defendant had sixty-eight acres ready for potatoes, which were afterwards sown, and were amply sufficient to have grown more than 200 tons in an ordinary season; but in August, without any default on the part of the defendant, the disease attacked the crop, and the defendant was able to deliver only about 80 tons. It was *held*, that the contract was for potatoes off specific land, and was therefore a contract for part o a specific crop, although *not sown at the time.*

A study of the respective judgments in this case will satisfy the mind that an assignment or mortgage of crops, not sown at the time, can be brought, by a proper description, within the rule of equity.

Assuming, of course, the property assigned to be properly and specifically described, then the law seems settled, particularly by *Howell* v. *Coupland* that a Court of Equity would decree the specific performance of an assignment of crops to be thereafter sown.

In that case the defendant was relieved from a performance of his contract, because through no default of his own, the specific crop bargained for was destroyed. The potatoes were not in existence when the contract was made, but that made no real difference in principle. If a contract, because specific, is relieved against, the converse is fair that, if specific, it will be enforced. If specific, so as to be relieved against, because the crop was of specific kind and off specific land, so, when of specific kind and off specific land, it must be specific, so as to be enforced. If performance is excused because the con-

* "It has been argued that *Re Thirkell, Perrin* v. *Wood* is not an authority in support of a grant of after-acquired property, unless the after-acquired property was brought on to the *locus* in substitution of other goods. As to this, Crowder, J. says in *Chiddell* v. *Galesworthy*, 6 C.B.N. S. 479: "It has been attempted to distinguish this case on the ground that the goods here seized were not substituted property but after-acquired. I do not see that that makes any difference. The authority given by the instrument is precisely the same as to both. The subject has been under the consideration of all the Courts, and nobody has ever suggested a distinction between substituted and after-acquired property."

tract is to deliver out and from a specific crop, much more so will an assignment be enforced when identity is made the easier by the assignment being of *all* and not a *portion*. If it be lawful to relieve against an agreement to "sell what will be and may be called specific things" when its performance becomes impossible, then when possible it is surely lawful to enforce an agreement "to sell what will be and may be called specific things," and if relief is granted upon a condition implied, (Melish L. J. *Howell* v. *Coupland*, *supra* at p. 262), surely performance will be decreed upon a condition expressed. In a mortgage of crops to be thereafter sown identity can be made complete, and it was the identity that gave the regent potato its specific character, and identity that upheld such a mortgage when contested in a County Court case (*McIlhargy* v. *Martin*, per Dean Co. J). If then, specific performance of such an assignment would be enforced in equity, then on the authority of some of the cases we have referred to, such an assignment would be upheld in law, and the rights of a mortgagee of after-sown crops preferred to those of creditors, subsequent purchasers and mortgagees in good faith.

The English cases of *Brantom* v. *Griffits*, L. R. 1 C. P. D; 2 C. P. D. 212, overruling *Sheridan* v. *McCartney*, 11 Ir. C. L. (N. S.) 506, and *Ex parte Payne*, *in re Cross*, have not escaped us. These cases merely except such mortgages as we are discussing from the operation of the Imperial Bills of Sale Act on reasoning that does not apply to make them bad at Common Law. The term "personal chattel" in this statute is given a statutory definition; namely, to such chattels as are capable of a *present complete delivery*. Hence growing crops cannot be within the Imperial Act. It may be observed that the words in our statute are not unsimilar in effect to the statutory definition of the Imperial words, but our statute has reference to the property, not so much when the mortgage is executed, as when the mortgagee insists upon his charge (Blake V. C., in *Perrin* v. *Wood*, *supra*, at p. 509).

Then, if a mortgage of crops to be planted and produced is good, to what extent, in point of time, will such a mortgage be upheld? We find at law that a period of seven years did not prejudice a grant of that which had a potential existence at the time of the grant (Perkins, tit. Grants, §90). Will not the specific nature of a chattel do as much through equity as the potential existence of property did through law? A comparison of power between equity and law indicates the affirmative, though if *O'Neill* v. *Small et al.* 15 C. L. J. 114, be good law the defeazance clause would prevent the likelihood of such a mortgage being ever executed. Policy sometimes, however, does make the law, and though this is a dangerous element, sound politic reasons could be advanced in favour of limiting a period beyond which mortgages of future acquired property or crops to be afterwards sown should be illegal and void, if already they are not so, as they so far appear not to be.

J.A.B.

LAW SOCIETY—EASTER TERM.

The following is the *resume* of the proceedings of Convocation, published by authority:

May 16, 1881.

Present,—Messrs. Blake, Read, Crickmore, Martin, Pardee, Mackelcan, Moss, J. F. Smith, T. M. Benson, J. Maclennan, Foy, Meredith, Hoskin, Bell, Bethune, Murray, Glass, Hardy, J. H. Ferguson, Kerr, Britton, Irving, Robertson, T. Ferguson, H. Cameron, A. Lemon, L. W. Smith, McMichael.

On motion of Mr. Crickmore, seconded by Mr. Martin, Mr. Blake took the chair.

The Secretary read the report of the scrutineers, and declared the following persons to be duly elected Benchers of the Law Society, namely, W. R. Meredith, D. McCarthy, J. Bethune, D. B. Read, Thos. Ferguson, D. McMichael, F. Mackelcan, J. Maclennan, J. Hoskin, C. Moss, T. M. Benson, Thos. Robertson, J. K. Kerr, H. Cameron, Æ. Irving, B. M. Britton, J. Bell, A. S. Hardy, J. J. Foy, H. W.

M. Murray, S. Richards, T. B. Pardee, E. Martin, J. F. Smith, W. H. Scott, J. Crickmore, J. H. Ferguson, D. Glass, A. Lemon, L. W. Smith.

Mr. Read moved, seconded by Mr. Robertson, that Edward Blake be elected Treasurer for the ensuing year. Carried unanimously.

The Treasurer took the chair.

Ordered that the following gentlemen be called to the Bar:—Mr. George Bell, with honors, and also Messrs. J. O'Meara, G. Macdonald, J. Birnie, Jr., H. J. Duncan, L. McMeans, W. B. Towers, F. E. Galbraith, J. K. Dowsley, C. H. Allan, C. E. S. Radcliffe, J. C. Eccles, G. W. Baker, H. V. Knight, G. Ritchie. The above named gentlemen attended, and were called accordingly.

Ordered that the following gentlemen do receive their certificates of fitness, namely:—Messrs. G. Bell, J. Birnie, jr., F. E. Galbraith, J. L. Darling, S. C. Johnstone, G. McDonald, H. J. Duncan, J. A. Loughead, C. Wright, R. A. Matheson, H. V. Knight, G. Ritchie, A. Innes, F. W. Kittermaster, C. M. Foley, J. O'Meara, E. V. Bodwell, F. A. Hilton, C. E. Macdonald, L. McMeans, S. G. Mackay, and H. Bolster.

Ordered that the first intermediate examinations of the following candidates be allowed them as students and articled clerks, namely:—Messrs. P. D. Crerar, J. Bicknell, Jr., J. L. Murphy, G. Morehead, S. F. Washington, D. Urquhart, A. W. Ambrose, J. W. Delaney, T. N. Marshall, R. W. Armstrong, R. P. Echlin, W. J. Northwood, G. F. Cairns, J. G. Jones, I. P. Telford. G. W. Allan, W. D. MacIntosh, C. H. Ivey, W. I. Taylor, J. W. Berryman, H. V. Green, W. A. Werrett, H. F. Sorley, T. C. Atkinson, L. C. Smith, F. G. Forgie, C. Henderson, T. M. Best, M. S. McCraney, G. Smith, R. A. Coleman, F. A. Munson, R. H. Hubbs, E. N. Sayers, D. T. Symons, C. C. Ross, C. S. Jarvis, J. R. Miller, E. Weld, O. H. Mackenzie, A. W. Burk, H. V. Bray, J. J. Conacher.

Ordered that the second intermediate examinations of the following candidates be allowed them as students and articled clerks, namely:—Messrs. W. Burgess, E. T. English, L. F. Heyd, W. R. Riddle, R. W. Leeming, John Cameron, C. P. Wilson, J. D. Gansby, M. Mackenzie, F. H. King, F. A. Campbell, J. Dickinson, A. Mackenzie, J. C. Coffee, A. Beasley, J. Chisholm, J. P. Maybee, H. H. Robertson, A. D. Kean, H. A. McLean, E. A. Lancaster, B. C. McCann, R. K. Cowan, John Strange, G. W. Ware, A. J. Williams, W. G. Shaw, A. W. Beardmore, H. D. Helmcken, L. H. Dickson, W. H. Hudson, W. P. Deroche, L. G. Drew.

Ordered that the following gentlemen as graduates be entered on the books of the Society as students-at-law, namely:—Adam Carruthers, B.A., James Alex. Hutchison, B.A. And the following gentlemen as matriculants of universities be also entered on the said books as students-at-law, namely:—John L. Peters, Morris, Johnson Fletcher, F.C. Powell.

Ordered, that the following gentlemen, who have passed the examination, be entered on the books as Students-at-Law, namely:—H. G. Macbeth, A. A. Fisher, W. E. S. Knowles, T. Hobson, R. A. Dickson, P. D. Cunningham, A. McLean, W. T. McMullen, M. Everts, W. J. McWhinney, R. Armstrong, A. D. McLaren, E. C. Emery, J. Crane, J. M. Roger, E. Kennedy, G. H. Stephenson, A. W. Wilkin, and W. G. Fisher.

The petition of Messrs. Sawers and Moore was read.

Ordered to be considered on Saturday next.

Mr. Irving, seconded by Mr. Britton, moved as follows:—That the Treasurer and Messrs. Read, Irving, Maclennan, Crickmore, Hoskin, Cameron, and Kerr, be appointed a special committee to strike the standing committees to be selected by Convocation in accordance with Rule No. 97.—Carried.

Mr. Mackelcan gives notice that he will, on Tuesday next, the 17th instant, move that the Chairman of the Reporting Committee be requested to communicate with the Minister of Justice and with the Registrar of the Supreme Court of Canada, to ascertain whether the cost to the Society of the reports of that Court cannot be reduced, and to intimate that if such reduction cannot be obtained, the Society will take into consideration the expediency of discontinuing their subscription to these reports.

Mr. Hoskin gives notice that he will, on Saturday, 21st May, 1881, introduce the following rule, and move its first reading, namely:

Whenever any complaint shall be made to the Law Society, charging any barrister, solicitor, student, or articled clerk, with misconduct as defined by the Act, such complaints shall be submitted to Convocation at its next meeting, and in case Convocation shall be of opinion that a *prima facie* case has been shown, the matter shall be sent to the Discipline Committee for investigation, and the said Committee shall thereupon notify in writing the complainant and party against whom the complaint has been made, of the time and place appointed for such investigation, and the said Committee shall, at the time and place appointed, proceed with the investigation, and shall reduce to writing the statements made and evidence adduced by the parties or of such of them as shall appear pursuant to such notice, and shall submit the same together with all books and papers relating to the matter, with their views thereon, to Convocation, who shall take such action thereon as to Convocation shall seem meet; and in case the parties or any of them fail to appear pursuant to notice at the time and place appointed, the said Committee shall thereupon proceed with said investigation in their absence.

Mr. Moss gives notice that he will to-morrow move the re-appointment of the Committee on the subject of Uncertificated Conveyancers, and that the names of J. J. Foy and J. F. Smith be added thereto.

Mr. Irving presented the following report

of the Select Committee appointed to strike the Standing Committees, which was adopted.

REPORT.

Journals of Convocation—T. Ferguson, J. J. Foy, J. Hoskin, J. K. Kerr, C. Moss, J. Maclennan, D. McCarthy.

Discipline—T. M. Benson, J. Hoskin, D. McMichael, J. Maclennan, S. Richards, J. K. Kerr, T. Robertson.

Finance—J. J. Foy, J. Crickmore, E. Martin, D. B. Read, S. Richards, L. W. Smith, H. W. M. Murray.

Legal Education—T. M. Benson, J. Crickmore, J. H. Ferguson, C. Moss, J. Hoskin, J. F. Smith, F. Mackelcan.

Library—J. Bethune, H. Cameron, T. Ferguson, Æ. Irving, D. McMichael, J. H. Ferguson, C. Moss.

Reporting—J. Bethune, B. M. Britton, H. Cameron, F. Mackelcan, J. Maclennan, D. McCarthy, E. Martin.

County Library Aid—T. M. Benson, H. Cameron, D. Glass, W. R. Meredith, J. K. Kerr, T. Robertson, B. M. Britton.

Mr. Bethune gives notice that on to-morrow he will move an amendment of the Rule which declares that the Standing Committees shall consist of seven members, by providing that these committees shall consist of nine members, the quorum to remain as at present.

Messrs. Connor, Johnston, Darling, and Wright were ordered to be called to the Bar, and were called accordingly.

Dr. Smith moves that Messrs. Foy, Kerr, and T. Ferguson be added to the Building Committee.—Carried unanimously.

Mr. Bell gives notice for to-morrow that he will move to amend the fifth rule respecting the Convocation of Benchers, by inserting after the word "forenoon," on the fourth line, the words "except on Monday, when the hour of meeting shall be twelve o'clock noon."

Mr. Maclennan presented the report of the Special Committee on the subject of Honors and Scholarships, which was ordered for immediate consideration and adopted.

Ordered,—

That Mr. George Bill do receive a Silver Medal.

That the following gentlemen be recorded as passing the Second Intermediate Examination with honors, namely, Messrs. Burgess, English, Heyd, Riddle, Leeming, Gansby, and Cameron.

That Mr. Burgess do receive the first scholarship of one hundred dollars.

That Mr. English do receive the second scholarship of sixty dollars.

That Mr. Heyd do receive the third scholarship of forty dollars.

That the following gentlemen be recorded as passing the First Intermediate Examination with honors, namely, Messrs. Crerar, Murphy, Bicknell, Morehead, Delaney, Urquhart, Washington, and Ambrose.

That Mr. Crerar do receive the first scholarship of one hundred dollars; Mr. Murphy the second scholarship of sixty dollars; and Mr. Bicknell the third scholarship of forty dollars.

Mr. Irving presented the report of the Library Committee, dated 8th March last, which was adopted.

Convocation adjourned.

Tuesday, 17th May, 1881.

Present :—The Treasurer, Messrs. Crickmore, Martin, Benson, Meredith, J. F. Smith, Macklennan, Mackelcan, Moss, Hoskin, Glass, Hardy, Irving, T. Ferguson, Bethune, Britton, Read, Foy, L. W. Smith, McMichael.

Mr. Mackelcan moved, pursuant to notice, as follows :—

That the Chairman of the Reporting Committee be requested to communicate with the Minister of Justice and the Registrar of the Supreme Court of Canada, to ascertain whether the cost to the Society of the reports of that Court cannot be materially reduced.—Carried.

Mr. Benson moved the resolution of which Mr. Bell gave notice, as to the hour of meeting on Mondays, which, after some discussion, was dropped.

Mr. Bethune, pursuant to notice, moved the adoption of the following rule, namely :—

That Rule No. 97 of the old rules, and 101 of the new rules, be repealed, and the following substituted :—

"Each Standing Committee shall consist of nine members in addition to the Treasurer, who shall be, *ex-officio*, a member of all Standing Committees; and three members of any committee shall constitute a quorum, unless otherwise specially ordered."

The Rule was read a first and second time.

Mr. Martin moved the suspension of the rules as to the stages of rules, seconded by Mr. Crickmore.—Carried unanimously.

The Rule was read a third time.

Mr. Meredith moved that it be referred to the Special Committee appointed yesterday to strike the Standing Committees, to report the names of members to be added to the Standing Committees, pursuant to the above rule.

Mr. Moss moved, seconded by Mr. Britton :—That the committee on the subject of uncertificated conveyancers, appointed during Hilary Term last, be re-appointed, and that Messrs. J. F. Smith and J. J. Foy be added to the committee.

Mr. Mackelcan presents the report of the Special Committee on the subject of the encouragement of legal studies, which was considered and adopted as amended on Friday, 27th May.

Mr. D. B. Read gave notice that on Saturday next, he will move that Mr. Crickmore, chairman of the Legal Education Committee, be appointed representative of the Law Society in the Senate of the University of Toronto to the End of Easter Term, 1882.

Mr. Crickmore, chairman of the Legal Edu-

cation Committee, laid before Convocation the letters of Mr. McDougall, Examiner, on the subject of the conduct of a law student, and the two letters of the student to Mr. McDougall in connection with the matter.

Mr. Bethune moved, seconded by Mr. Read, That the above correspondence be referred to the Committee on Discipline for inquiry, and report.—Carried.

Mr. Martin gave notice that he would on Friday, the 27th inst., move that a rule be passed to increase the grant to existing County Libraries.

Mr. Galbraith was called to the Bar.

Mr. Irving presented the report of the Striking Committee pursuant to the reference made this day, which was adopted.

Ordered, That the following names be added to the following Standing Committees:—

FINANCE.—W. R. Meredith and A. S. Hardy.

LIBRARY.—W. H. Scott and John Bell.

COUNTY LIBRARY AID.—A. S. Hardy and T. Ferguson.

LEGAL EDUCATION.—A. Lemon and T. B. Pardee.

REPORTING.—D. Glass and J. F. Smith.

JOURNALS.—T. B. Pardee and B. M. Britton.

DISCIPLINE.—David Glass and E. Martin.

Convocation adjourned.

SATURDAY, May 21st, 1881.

Present,—The Treasurer, and Messrs. Crickmore, McCarthy, T. Ferguson, Murray, Bethune, Hoskin, Maclennan, J. F. Smith, Irving, Benson, Foy, Read, L. W. Smith, Moss and Kerr.

Mr. McCarthy moved, seconded by Mr. Ferguson, That the petition of Messrs. Moore and Sawers be referred to the Committee on Discipline, with instructions to consider and report whether the same discloses a *prima facie* case for inquiry and action by the Society.—Carried.

The Treasurer reported that he had laid the rules before the Visitors, and received communications from the Chancellor and Mr. Justice Armour expressive of their opinion, and approving of the rules with certain modifications suggested in the copy laid before the Benchers.—The letters and copy were filed.

Mr. T. Ferguson moved, That the fifth rule be amended by inserting in lieu of the words "gowns" "in the costume of Barristers appearing in court," and that the 80th rule be amended by inserting in lieu of the words "a Barrister's gown," the words "in the costume of a Barrister appearing in Court."

That the second and third sub-sections of the 95th rule be amended, by inserting in each subsection before the word "application," the word "adverse."

That sub-section (A) of sub-section (1) of the 140th rule be amended, by inserting at the commencement "during any sitting of the Court of Chancery," and

That sub-section 9 of the 140th rule be amended, by inserting after the word "Chancery" the words "and the Clerk of the Crown and Pleas of the Court of Queen's Bench."

That rule 144 be amended by inserting after the words "sittings," "and one of such reporters shall attend such sitting of the Court held by a single Judge."

Notice was dispensed with unanimously.

The rule was read a first and second time.

The rule as to the stages of rules was dispensed with unanimously.

The rule was read a third time and passed.

Mr. Crickmore moves that the consideration of the report of the Legal Education Committee be postponed to Friday next.—Carried.

Ordered, That Mr. George Frederick Lawson be entered on the books as a student.

Ordered, That Mr. W. Leslie Beale be entered as an Articled Clerk.

Ordered, That C. Egerton Macdonald be now called to the Bar, and receive his Certificate of Fitness on the 1st day of June.

Mr. Macdonald presented himself and was called to the Bar.

Ordered, that Mr. Spotton receive back his fee in full under the special circumstances detailed in the report.

Mr. Read presented the Report of the Finance Committee, recommending that they be authorized to sell ten thousand dollars of Government Stock, as the exigencies of the Building Committee may require.—Adopted.

Mr. Read moved, pursuant to notice, that Mr. Crickmore, the Chairman of the Legal Education Committee, be appointed representative of the Law Society in the Senate of the University of Toronto, to the end of Easter Term, 1882.—Carried.

Mr. Hoskin, Chairman of the Discipline Committee, presented their report in the case of the Student above named.—Ordered for consideration on Friday next.

Mr. Hoskin moved, pursuant to notice, the first reading of the rule as to discipline.

The rule was read a first and second time.

The rule as to stages was dispensed with unanimously. The rule was read a third time and passed.

Mr. L. W. Smith moved that it be referred to a select committee, to be composed of Messrs. L. W. Smith, Read, Maclennan, Benson and Moss, to settle the list of visitors and benchers, to be published with the rules.—Carried.

Mr. Maclennan reported that at the request of Convocation, he had conferred with the visitors, who agreed to the third rule as it stands.

It is recorded that with the amendments made this day, on the motion of Mr. Ferguson, the rules accord with the suggestions made by the visitors, subject to which they were approved, and they are accordingly deemed by Convocation to be approved by the visitors.

Convocation adjourned.

LAW SOCIETY.

Friday, 27th May, 1881.

Present:—The Treasurer, Messrs. Read, Crickmore, J. H. Smith, C. Moss, Cameron, Foy, J. A. Ferguson, Murray, Kerr, Hoskin, Robertson, Irving, Martin, Maclennan, Mackelcan, L. W. Smith, Hardy, Robertson and Richards.

The report of the Special Committee on the subject of the encouragment of Legal Studies by the Law Students in the various parts of the Province, through the giving of prizes for examinations, on the subjects of lectures which may be delivered by members of the Local Bar to the students of the locality, was considered and amended and adopted as amended as follows:

REPORT.

The Special Committee appointed to consider and report a plan for the encouragement of legal studies by the law students in the various parts of the Province, through the giving of prizes for examinations, on the subjects of lectures, which may be delivered by members of the local Bars, to the students of the locality, beg leave to report as follows:

1. The establishment by the members of the Law Society, resident at suitable points throughout the Province, of associations on the same general principles as those governing the Osgoode Legal and Literary Society, would tend to enlarge the legal knowledge, and to improve the powers of reasoning, speech and composition of the members, and in many ways to fit them better for the profession,

2. Associations can be usefully formed only where there are a sufficient number of students to ensure a good attendance, and of barristers disposed to deliver lectures, conditions which, it is believed, obtain at several points in the Province.

3. Associations can be established and managed only by the voluntary action and exertions of residents, and the Law Society cannot create or direct them; but it is believed that a recognition by the Society of their advantages, and the encouragment proposed to be given them, would tend to stimulate their formation and to promote their efficiency, and to produce through them the results contemplated in the resolution.

4. The Committee, to carry out these views, propose the following plan:—(The plan prepared by the above committee was amended, was subsequently adopted, and is embodied in the following:)

1st. That the Standing Committee called "The County Library Aid Committee," be a Committee to whom shall stand referred all the correspondence on this subject, and which shall have power, subject to the directions of Convocation, to work the plan so far as the Law Society is concerned, the Finance Committee retaining its control over expenditure.

2nd. That the members of the Law Society in every locality which contains a sufficient number, may form an organization by the name of "The (name of County town, or County, or union of Counties) Legal and Literary Society," or some similar name.

3rd. That among the objects of the Association, shall be the extension of the legal knowledge and the cultivation of the powers of reasoning, speech, and composition of the members, by the delivery of lectures by Barristers on some of the more important branches of the Law, and examinations thereon, by the preparation and reading of essays, and by arguments on legal questions.

4th. That the Association may transmit to the Law Society proof of its formation, with a copy of its rules and a list of its members, and proof that arrangements have been made for the delivery during the season of a course of eighteen or more lectures at least one hour long on three or more of the more important branches of the law by three or more Barristers, giving the subjects and the names of the lecturers, and proof that arrangements have been made for the holding by two or more of such lecturers of a written examination comprising twenty-four or more questions equally divided among the various subjects of the lectures, such examination to be managed on the same general principles as are applied to the written examinations of the Law Sociey, subject to such modifications as the standing Committee may from time to time direct. And the Association may thereon apply to be recognized by the Law Society as an Association within the meaning of this plan.

5th That the Committee may require such further information and details as shall seem advisable, and may on being satisfied as to the facts, resolve that the Association be recognized.

6th. That any recognized Association may transmit to the Law Society proof that the course of lectures has been delivered to audiences comprising on the average 12 or more students: and that the examination has been held, and that eight or more student have competed thereat, and proof of the results of the examination.

7th. That in case it appears that any of the competitors have succeeded in obtaining at least three quarters of the aggregate marks obtainable on all the subjects, and at least one half of the aggregate marks obtainable in each subject, the first of such successful competitors shall be entitled to a prize of law books of the value of $25, the second to a like prize of the value of $15, and the third to a like prize of the value of $10.

8th. That the Standing Committee shall have power, on the application of any recognized Society, to authorize the division of the competitors into two classes, and the division of the prizes in the same way under such regulation as may be made by the Committe, and in that court, the prizes may be given to the value of $50 in each class.

9th. That the Osgoode Legal and Literary Society be deemed to be a recognized Society within the meaning of this rule, and that the special rule, as to prizes for that Society, be rescinded.

10th. That the standing Committee may in any case require further information or further evidence on any point connected with the proceedings.

11th. That the standing Committee being satisfied that under the above conditions any competitor is entitled to a prize, may report thereon to the Finance Committee stating the fact, and thereon the Finance Committee may authorize the giving of the prize.

12th. That the standing Committee shall report to convocation on the first day of Hilary Term in each year on the operation of the previous year.

(Signed) ED. BLAKE,
Chairman Special Com.

The report was read and received.

The rule was read a first and second time.

Ordered, that it be read a third time at the next meeting of Convocation.

Mr. Maclennan presented the report of the Committee on reporting, which was received, read, and considered.

The first two paragraphs as to the state of the reporting were read; no action was required.

The third and fourth paragraphs as to the Supreme Court reports were read.

Ordered that the chairman of the Reporting Committee be requested to communicate with the Minister of Justice, and to report at the next meeting, to which time the consideration of this paragraph is adjourned.

Mr. Foy moved that the consideration of paragraph five as to Mr. Hodgins' report of election cases be adjourned to the next meeting of Convocation.

Paragraph six, on motion of the chairman of Committee, was struck out.

The seventh paragraph of the report was adopted.

The report of the special committee appointed to settle the list of visitors and Benchers to be published with the rules, was considered.

Ordered that the report of the Committee be referred back to the Committee with instructions to omit the names of the visitors and *ex officio* Benchers, and to insert instead a quotation from the 3rd and 4th sections of chapter 138 of the Revised Statutes of Ontario.

The report of the Building Committee was received and read.

The report of the Committee on Discipline in the case of the student who attempted to bribe one of the examiners, postponing his June examination until Easter Term 1883, was adopted.

The communications from Messrs. Robinson and Joseph, on the subject of the triennial digest, were referred to the Committee on Reporting.

The report of the Legal Education Committee on the case of Mr. C. R. Irvine, refusing his application, was adopted.

The Rule as to discipline adopted on the 21st instant, was repeated, and the following rule, which had received the assent of the visitors, was introduced as follows:—

RULE.

Whenever any complaint shall be made to the Law Society charging any Barrister, Solicitor, Student or Articled Clerk with misconduct as defined by the Act, 44 Victoria, Chapter 17, entitled, "An Act to extend the powers of the Law Society of Upper Canada," such complaint shall be reduced to writing, and shall be submitted to Convocation at its next meeting, and in case Convocation shall be of opinion that a *prima facie* case has been shown the matter shall be sent to the Discipline Committee for investigation, and the said Committee shall thereupon send a copy of the complaint to the party complained of, and shall notify in writing the complainant and party against whom the complaint has been made, of the time and place appointed for such investigation, and the said Committee shall, at the time and place appointed, proceed with the investigation, and shall reduce to writing the statements made and evidence adduced by the parties or of such of them as shall appear pursuant to such notice, and shall submit the same together with all books and papers relating to the matter, with their views thereon, to Convocation, who shall take such action thereon as to Convocation shall seem just and meet; provided that no Barrister shall be disbarred nor Attorney deprived of his certificate without a two-thirds majority of Benchers then present in Convocation, which shall consist of not less than fifteen members. And in case the parties or any of them fail to appear pursuant to notice, at the time and place appointed, the said Committee may thereupon proceed with said investigation in their absence. Provided always that it shall be competent to Convocation to refer the matter to the Discipline Committee, to consider and report whether a *prima facie* case has been shown.

The rule was read a first, second and third time and was adopted.

A communication from the architect on the subject of heating Osgoode Hall, was referred to the Building Committee, to ascertain cost of proposed improvements and to report thereon.

Mr. Martin moved, seconded by Mr. Irving, That it be referred to the County Library Aid Committee to consider the advisability of increasing the grant to existing county libraries. —Carried.

A petition from Mr. Eccles, to be permitted to present himself for call to the Bar, pursuant to an Act of last session, was ordered to be considered at the next meeting of Convocation.

Mr. Hoskin, from the Committee on Discipline, reported the approval by the visitors of the rule upon discipline.

Mr. Murray gave notice that he would at the next meeting of Convocation move that, except during the long vacation, the library be opened at eight o'clock in the evening, and kept open until eleven o'clock; provided always, that if no member of the Society attends by nine o'clock, the same shall then be closed.

June 4, 1881.

Present: The Treasurer, and Messrs. Read, Crickmore, Martin, Mackelcan, J. H. Ferguson, Foy, Hoskin, Murray, Hardy, Irving, Dr. Smith, Maclennan, Robertson, Moss, Bethune, McCarthy, Kerr and Smith.

Mr. Crickmore presented the report of the Legal Education Committee, on the subject of the curriculum, which was ordered to be considered during the present sitting of Convocation.

Mr. Read presented the report of the Finance Committee on the claim of Messrs. Langly, Langly & Burke, recommending that $300 be paid them in full of their claim.—The report was adopted.

Dr. Smith, from Building Committee, reported on the heating arrangements for Osgoode Hall generally, and also on the heating apparatus for the new wing.

Ordered, that it be referred to a Special Committee, consisting of Messrs. L. W. Smith, Read, Foy, Crickmore and the Treasurer (three being a quorum), to enter into the necessary contracts for the heating of the new building, and to confer with the Ontario Government upon the subject of heating the main building.

Ordered that the secretary cause the list of Visitors and Benchers to be printed for the new rules, in accordance with the instructions given the Special Committee on this subject at last meeting.

The letter of Vice Chancellor Ferguson, resigning his seat as a Bencher, was read.

Ordered that a call of the Bench be had for the first Tuesday of Trinity Term, to elect a successor to Vice Chancellor Ferguson.

Mr. Hoskin, from the Committee on discipline, brought up the case of a student which had been already dealt with by this Committee, and gave notice that he would move at the next meeting of convocation, that this case be taken up for the purpose of considering and determining the sentence to be awarded.

Mr. Maclennan presented the report of the Committee on reporting on the communication from Messrs Robinson and Joseph on the subject of the triennial digest, recommending that the publication of the digest should be kept under the control of Convocation, and not left to private enterprise. The report was adopted.

Mr. Lundy's letters on the subject of his certificates were referred to the Finance Committee with power to act.

The Petition of Mr. Eccles for permission to present himself for call to the Bar next Term, was considered.

Ordered that Mr. Francis Hew Eccles be permitted to present himself for examination for Call to the Bar at the ensuing Trinity Term, upon giving the usual fees, including the matriculation fee, namely, $153.

The rule for the encouragement of Legal Education in the country by means of Lectures, was read a third time and passed.

The rule for the encouragement of Legal Education by lectures, examinations, &c., was read a third time and passed.

The fifth clause of the report of 27th May of the Reporting Committee on the subject of Mr. Hodgins' election reports was considered and adopted.

Mr. Murray moved his resolution relative to opening the Library at night, of which he had given notice.

Ordered, that it be referred to the Library and Finance Committees, to consider and report thereupon to Convocation.

Mr. Kerr moved that Messrs. Mac'ennan, Mackelcan, Moss, and the mover, be a committee to wait upon the Ontario Government with the view of securing a reduction in the fees charged for shorthand notes, and the trial and hearing of causes.—Carried.

Ordered, that the subscription of the Law Society to the Supreme Court Reports be continued for the next volume at the price named by the Deputy Minister of Justice in his letter of 3rd instant, namely, $1.50 per copy for 1,350 copies.

The report of the Legal Education Committee on the Curriculum was considered and adopted, to come into force at the examinations immediately before next Hilary Term. Lewis' Equity Pleading to be struck out of the present curriculum at once.

Mr. J. H. Ferguson gave notice that he would, at the first meeting of Convocation, in Trinity Term, move that, Convocation considering it expedient to re-establish a Law School under the control of the Society, it be referred to the Committee on Legal Education, to consider and report to Convocation upon a scheme for the re-establishment of the Law School.

Convocation adjourned.

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

JUNE SESSIONS.

Ontario.]

GRAND TRUNK RAILWAY CO. OF CANADA v. FITZGERALD ET AL.

Agreement—Additional parol term—Conditions—Carriers—Wilful negligence.

The plaintiffs (respondents) sued the defendants (appellants) for breach of a contract to carry a quantity of petroleum in covered cars from London to Halifax, alleging that they so negligently carried the same upon open platform cars, whereby the barrels in which the oil was, were exposed to the sun and weather and were destroyed. At the trial a verbal contract between the plaintiffs and the defendants' agent at London was proved, whereby the defendants agreed to carry the oil of the plaintiffs in covered cars with quick despatch. The oil was forwarded in open cars, and delayed at different places on the journey and in consequence of which a large quantity was lost. On the delivery of the oil the plaintiffs signed a receipt note, which said nothing about covered cars, and which stated that the goods were subject to conditions endorsed thereon, amongst which were, viz.: "that the defendants would not be liable for leakage or delays, and that oil was carried at owner's risk."

Held, per Sir W. J. RITCHIE, C. J., and FOURNIER and HENRY, JJ., that the loss did not result from any risks by the contract imposed on the owners, but that the loss arose from the wrongful act of the defendants in placing these goods on open cars, which act was inconsistent with the contract they had entered into and in contravention as well of the undertaking as of their duty as carriers.

Per STRONG, FOURNIER, HENRY and GWYNNE, JJ.,—affirming the judgment of the Court of Common Pleas, that the verbal evidence was admissible to prove a contract to carry in covered cars, which contract the agent at London was authorized to enter into, and which must be incorporated with the writing, so as to make the whole contract one for carriage in covered cars, and therefore defendants were liable.

McMichael, Q. C., and *J. Bethune*, Q. C. for appellants.

Glass, Q. C., and *Fitzgerald*, for respondents.

Ontario.]

ERBB ET AL v. GREAT WESTERN RAILWAY CO.

Shipping note—Fraudulent receipt of agent for goods not received—Liability of Company.

One W.C., who was defendant's (respondents') agent at Chatham, and also a partner in the firm of B. & Co., in fraud of the defendants, caused printed receipts or shipping notes in the common form used by the defendants' company, to be signed by his name as respondents' agent in favour of B. & Co., for about 1,200 barrels of flour, no flour at that time having been shipped, and no flour ever having been delivered to the company to answer the said receipts. The receipts or shipping notes acknowledged that the company had received from B. & Co. the barrels of flour addressed to the appellants, and were attached to six drafts drawn by B. & Co. at sixty days, and accepted by the appellants. W. C. received the proceeds of the drafts, and afterwards absconded.

In an action brought by appellants against respondents to recover the amount of the drafts.

Held, that the act of W. C. in issuing a false and fradulent receipt to B. & Co., of which firm he was a member, for goods never delivered to the company to be forwarded, was not an act done within the scope of his authority as defendant's agent, and therefore the respondents were not liable.

FOURNIER and HENRY JJ., dissented.

J. Bethune, Q.C., for appellants.

C. Robinson, Q.C., for respondents.

Quebec.]

COTE ET AL v. MORGAN ET AL.

Writ of Prohibition to municipal corporation—Assessment Roll.

This was an appeal from a judgment of the Court of Queen's Bench (appeal side) for the Province of Quebec, maintaining a writ of prohibition issued in the Superior Court of the

Province of Quebec, at the instance of the respondents, to prohibit the appellants from proceeding to sell the property of respondents for taxes due under a certain assessment roll of 1876.

In 1875, a valid assessment roll for the municipality in which the properties were situated, was made, which by law continued to be in force for three years—on complying with certain formalities, the council had power to amend such roll. In 1876. another roll was made and the evidence showed that it was a triennial roll which was made, and not an amended roll as contended for by the appellants. By their *requete libellee* the respondents demanded that a *bref de prohibition* should issue out of the court addressed to the defendants, enjoining them from selling and forbidding them to sell the real property of the plaintiffs so seized, or to proceed in any manner upon the said assessment roll of 1876, or to collect any taxes in virtue of that roll, and that the proceedings taken against the plaintiffs property might be declared to be illegal, void and of no effect; unless cause to the contrary be shewn by the defendants.

Held, per HENRY, TASCHEREAU and GWYNNE JJ., that respondents were entitled in this case to an order from the Superior Court to restrain the municipal corporation from selling their property as prayed for, and as it made no difference what name was given to the proceedings taken in the case, the writ of prohibition issued in this case should be maintained.

Sir W. J. RITCHIE, C. J., STRONG and FOURNIER, JJ., dissented. The court being equally divided the judgment appealed from was affirmed, but without costs.

Mousseau, Q. C., and *Archambault*, for appellants.

Barnard, Q. C., for respondents.

Quebec.]

VEZINA v. NEW YORK LIFE INSURANCE CO.

Life insurance—Insurable interest—Transfer—Wager policy—Payment of premium.

One Gendron applied to respondent's agent the application. The applicant was personally at Quebec for an insurance on his life, and signed subjected to a medical examination, and the application, the medical examiner's report, together with the certificate of a friend answering certain questions put to him by the company, were transmitted to the head office at New York. The application of Geudron was acceded to, and the policy, which is set out in the declaration, executed, whereby Gendron's life was insured from the date of the policy for one year upon payment of a certain premium, and to be continued in force by the annual payment of the premium. The policy was then transmitted frem the head office to the agent in Quebec, to whom the application had been originally made. The policy was not delivered for some time, as Gendron was unable to pay the premium, when one Langlois, approached by Michand, who had been entrusted by Gendron with a blank assignment, paid the premium, and thereupon the transfer of this policy was made to Langlois who received the policy and held it as the assignee of the assured; subsequently Langlois assigned this policy to the appellant, and all premiums up to the death of Gendron were paid by the assignees of the assured. The principal question which arose on this appeal was whether this was a wager policy obtained by Gendron's assignees, and whether there was an insurable interest in it. Prior to Gendron's death the general agent enquired into the circumstances of the case, and authorized the agent, Michaud, to continue to receive the premiums from the assignee.

Held, that at the time Geudron applied for an insurance on his own life, and his application was acceded to, and the policy sued upon executed, he effected *bona fide* an insurance for his own benefit, and as the contract was valid in its inception, the payment of the premium when made had relation back to the date of the policy, and the mere circumstance that the assignee (the insurance having been effected without his knowledge, and there being no collusion between the parties) paid the premium and obtained an assignment, could not make it a wagering policy.

GWYNNE J., dissenting].

Doutre, Q.C., for appellant.

S. Bethune, Q.C., for respondents.

New Brunswick.]

SWIM v. SHIREFF.

Contract to cut lumber—Vesting of property—Writ of replevin—Justification—Pleading.

In November, 1874, one Arbo agreed in writing with one Muirhead to get logs off land under Muirhead's control, and that they should be Muirhead's property as cut down. In December following one Maroney agreed with Arbo to cut and haul logs for him from the lands specified in the agreement between Arbo and Muirhead, Arbo agreeing to furnish Maroney with supplies to get the logs. Maroney cut logs under this agreement, and hauled them to the landing. In November, 1875 (the logs not having been driven, and Arbo not having furnished sufficient supplies), he and Maroney rescinded their agreement, Maroney giving his note to Arbo for the supplies delivered. The logs remained on the landing, and in February, 1876, they were seized as the property of Arbo (who had become insolvent), under a writ of attachment issued under the Insolvent Act of 1875. In May, 1876, Maroney sold the logs to the plaintiff, who drove them to the boom of the S. W. Miramichi river, where they were replevied by the assignee of Arbo's estate. The plaintiff put in a claim of property in them, and the Sheriff returned the writ of replevin with such writ, to the attorney who issued the writ. No writ *de prop. prob.* having been issued, the Sheriff kept possession of the logs, and the plaintiff (appellant) brought an action of trespass against the Sheriff, alleging that he had seized and taken the pliantiff's goods, to wit, certain timber, and disposed thereof to his own use.

The defendant pleaded—1 Not. guilty. 2. That the said goods were not nor were any of them the plaintiff's, as alleged. 3. That the goods in question were the goods of Ellis, assignee in insolvency of one Arbo, an insolvent, and that the defendant did what is complained of by the authority and permission and license of such assignee. 4. That the goods in question were the goods of one Muirhead, and that the defendant did what is complained of by the authority and permission and license of said Muirhead. 5. That the goods in question were not the goods of the plaintiff, but the same were the property of the defendant.

Issues were joined on these pleas. As there was no dispute as to facts, the parties entered into an agreement at the trial whereby it was agreed that a verdict should be entered for the plaintiff for $1,554.81, the full value of the logs at $5.50 per M. and 15 cts. survey, and that, if the Court should be of opinion that the plaintiff was not entitled to recover the Maroney logs—that is certain logs cut by Maroney, then the verdict was to be for 63 *M.*, calculated at the same rate.

Held, [FOURNIER and HENRY, JJ., dissenting] that the logs having been cut off lands under Muirhead's control by Maroney, as servant of Arbo, Maroney was not the proprietor of the logs, and therefore that plaintiff, who claimed through Maroney, was not entitled to recover the value of the Maroney logs.

Sir W. J. RITCHIE, C. J., was also of opinion that the judgment appealed from should be affirmed, but solely on the following ground:—It having been proved on the trial without objection and made part of the case, that the logs in question were seized by the defendant as Sheriff under a writ of replevin issued in the Supreme Court of New Brunswick directing him to take the logs in question, the Sheriff was justified in taking the logs thereunder, and that as against the plaintiff it was no wrongful taking or conversion. That this defence could be given in evidence under the pleadings in the cause; or, if it could not be so given, this being a strictly technical objection, and this defence having been put forward on the trial without objection, and no such technical point reserved on the trial, if necessary the record should be amended.

Per GWYNNE, J.—That under the issue joined under the 2nd plea, the defendant could have proved all matters alleged in the 3rd and 4th pleas, and that it was unnecessary to decide whether joinder in issue being filed to these pleas, put in issue anything but a *jus tertii* for that the parties plainly, by what took place at the trial, and the reservation then made for the consideration of the Court, rested the case solely upon the question of property without regard to any question as to whether defendant acted under such authority.

The appeal was dismissed with costs.

Barker, Q.C., for appellant.

Weldon, Q. C. for respondent.

QUEEN'S BENCH.

IN BANCO—JUNE 25.

REG. V. HODGE.

Liquor License Act—Power of Local Legislature.

The defendant was convicted of selling liquor to a child under 14 years of age, and of permitting a game of billiards to be played during prohibited hours on Saturday evening. An application was made to quash the conviction on the grounds, that the resolutions passed by the License Commissioner for the purpose of regulating the conduct of taverns were entirely in excess of their authority; that they claimed to derive their authority from the Ontario Government, and he urged that that assembly being the outcome of the British North America Act, had no power to delegate to others the power which they had in themselves.

Held, that the convictions on both charges were bad, and a rule was made absolute to quash them. The Court considered that the Ontario Legislature had no power to delegate to these commissioners the right to create new offences, whereon to convict for infringement of them.

J. K. Kerr, Q. C., for the defendant.
Fenton, for the Crown.

REG. V. FRAWLEY.

The defendant was convicted for selling liquor without a license, and sentenced to imprisonment with hard labour. A rule *nisi* was granted to quash the conviction on the ground that the Ontario Legislature had no power to impose hard labour with imprisonment, or in fact at all. That its jurisdiction was only to the extent of imprisonment and nothing more.

Held, that the conviction was bad, as the Ontario Legislature are not vested with the power to impose hard labour. They derive their right to punish offences from sec. 92, clause 15, of the British North America Act, which provides "for the imposition of punishment by fine, penalty, or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in the section." This, however, contains no provision as to hard labour, which is a matter *ultra vires*.

Osler, for the defendant.
Hodgins, Q. C., for the Crown.

GRAY V. TAIT.—Rule *nisi* discharged.

BAILLIE V. DICKSON.—Rule absolute for a new trial without costs.

QUEEN *ex rel.* CLANCY V. MACKINTOSH.—Rule absolute, setting aside the election of defendant with costs, and for a new election.

WOOD V. THOMPSON.—Rule discharged with costs, Cameron, J., dissenting.

SMITH V. KEOWN.—Rule absolute tor a new trial without costs.

WALTON V. YORK.—Rule discharged with costs.

HAMILTON V. HARRISON.—Rule absolute for a new trial without costs.

TAYLOR V. MCMILLAN.—Rule absolute to enter a verdict for plaintiff for $300, with full Queen's Bench costs.

NEWMAN V. SHANLY.—Rule discharged.

DREW V. EAST WHITBY.—Rule absolute to enter a nonsuit.

PARRY V. HALLIDAY.—Rule absolute for a new trial, to be tried by a judge, costs to abide the event.

HOWIE V. KENT.—Rule absolute for a new trial, without costs.

LAING V. ONTARIO L. AND S. CO.—Rule absolute to enter a verdict for plaintiff for $289, declaration to be amended.

FISHER V. GEORGIAN BAY CO.—Rule absolute to set aside verdict on the first count, without costs.

WATSON V. MACDONALD.—Rule discharged.

BARR V. BRANTFORD.—Rule discharged.

GRIFFIN V. MCKENZIE.—Rule discharged with costs.

QUEEN V. COLEMAN.—Rule discharged with costs, Cameron, J., dissenting on one of the points raised.

GREENMAN V. WHITE.—Rule absolute for a new trial by a judge without jury, costs to abide the event.

(These cases will be more fully noted hereafter.)

VACATION COURT.

Armour, J.] [June 21.

IN RE ALBERMARLE & EASTNOR.

Municipal act, sec. 383—Award.

Sec. 383 of the Municipal Act is imperative,

and failure to comply with it is fatal to the award.

The award in this case was set aside, as the Court could not from what was before it, understand why the arbitrators had so found.

There had been two previous awards, and references back, and much expense having been incurred, consisting largely of the arbitrators' own fees, the Court refused a further reference back, but ordered the matters to be taken before the County Court Judge, unless such facts could be agreed on as would facilitate the Court's deciding the matter.

Aylesworth, for applicant.

H. J. Scott, contra.

COMMON PLEAS.

IN BANCO—JUNE 24.

REGINA EX REL. DWYER V. LEWIS.

Quo Warranto—Municipal elections—County Court usage—Jurisdiction.

A County Court judge directed the issue of a writ of *Quo warranto* returnable before himself to test the validity of the election of an alderman of the city of Ottawa. Before appearance he set aside all proceedings with costs, on certain exception to the writs being taken before him.

An application to a judge of the Superior Court for a mandamus to compel the county judge to try the case was refused on the ground that the county judge had power to set aside the writ, and that his powers under the Municipal Act being co-extensive with those of a Superior Court judge, in such case there was no ground for interference.

On appeal to the full court.

Per WILSON, C. J., That the County Court judge had such power, and that the mandamus was properly refused.

Per OSLER, J., That he had no such power, and that the mandumas should have been granted.

GALT, J., took no part in the judgment.

The Court being equally divided, the case dropped.

Ogden, for the plaintiff.

Aylesworth, for the defendant.

SUTTON V. ARMSTRONG.

Chattel mortgage—Assignment—Intent of parties—Regulation of bills—Evidence—Trespass.

Action of trespass for seizing a quantity of grain. The seizure was made under powers therefor contained in one or both of two chattel mortgages, for the mortgagors default in selling certain of the goods without the mortgagee's consent. Both of the mortgages were executed on the 26th May, 1880, by the plaintiff to one J. G., and comprised the same goods and chattels, namely: a quantity of farming implements and stock, and all the grain in hand or in the ground upon certain land named, twenty-six acres of spring wheat, etc. One of its mortgages being to secure $215 and interest. The other being, as it recited, security for certain promissory notes of the mortgagor for $520 endorsed by the mortgagee. These notes had been discounted by the defendant who was the holder thereof. On the 26th July both these mortgages, together with the goods and chattels comprised therein, were severally assigned to the defendants by assignments executed by R. G., under a power of attorney from J. G., on 22nd July, or two days previously. R. G. and J. G., who had been trading in partnership, assigned to two persons, O. and K., upon certain trusts for the benefit of creditors, amongst other things, all the grain from stock, crops, whether growing or cut, and all other chattels and effects of the said assignor, or either of them, upon the said land, or otherwise, wheresoever situate, as also all mortgages, and all other personal estate wheresoever situate of the said assignors, or either of them, or in which any or them had any right or interest.

Held, that the terms of the deed of assignment were sufficient to include the mortgages and the goods comprised in them; and, therefore, as regarded the first-named mortgage, their being no contrary intention, it passed under the deed, so that the subsequent assignment of that mortgage to defendant was of no avail; but as regarded the other mortgage, the defendant being the beneficial owner thereof, and the mortgagee having no interest therein, there was an intention that it was to pass under the deed, and therefore the mortgage passed to defendant under the assignment to him.

The defendant was therefore held entitled to justify under this mortgage.

Semble.—That there was evidence to show that the plaintiff recognized the defendant's title as assignee.

Dixon, (of Lindsay) for the plaintiff.

William Mulock for the defendant.

WALTON v. CORPORATION OF THE COUNTY OF YORK.

Appeal—Appeal allowed—Disposal of rule nisi in court below.

In an action for negligence in not keeping in repair a county road, the jury found for the plaintiff. A rule *nisi* having been subsequently obtained to enter a non-suit, on the ground that no actionable negligence had been proved, and also for a new trial on the merits, this court made the rule absolute to enter a non-suit. On appeal to the Court of Appeal the court allowed the appeal, and directed the rule *nisi* to enter the non-suit to be discharged, but stated that as to that part of the rule *nisi* in which a new trial was asked they made no order, but left it to be disposed of by this court. On motion to this court to dispose of the matter,

Held, (WILSON C.J., dissenting) that this court could not now interfere. That the said rule *nisi* was completely and finally disposed of, so far as this court was concerned, by the rule making it absolute to enter a non-suit, and if the defendants had desired to have the question of the new trial reserved, in case of an appeal on the non-suit disallowed, that should have been done at the time.

Donovan, for the plaintiff.

J. K. Kerr, Q. C., for the defendants.

VANDERLIP v. SMYTH.

Road Company—Check gate—Authority to erect.

The plaintiff, a stage driver, residing in the town of Thorold, was in the habit of plying and driving St. Catharines, Thorold and Suspension Bridge Road Company's passengers over that part of the road—a company incorporated under C. S. U. C. ch. 49, and previous Acts—between Thorold and the terminus of the St. Catherines-street railway (laid down on the line of the road) a distance of about two miles. There was a principal toll-gate beyond the terminus of the street railway, and another in the opposite direction beyond the plaintiff's starting point, the distance between them being nearly three miles. The defendant, who was the lessee and manager of the road, erected a check-gate across the road at a point within the space travelled by the plaintiff, distant 22 chains 53 links from the street railway terminus, and 41 chains and 40 links from the gate beyond, and then enforced payment of toll on the plaintiff, giving a ticket which entitled the holder to pass through the gate beyond.

Held, that the statute conferred the power to erect such check-gate.

The company consisted of some four persons, two of whom, F. and another, personally signed an authority to the defendant to erect the gate, and F. signed for the other two under a power of attorney, for the management of their estate, which though very full in its terms, did not specially refer to this road, but after action commenced these other two persons ratified and confirmed F.'s act by endorsement on the back of the authority.

Held, sufficient.

McClive, for the plaintiff.

Bethune, Q. C., for the defendant.

RE MEAD AND CREARY & THE DOMINION LOAN AND SAVINGS CO.

Division Courts—Garnishing debt—Amount beyond garnishee's jurisdiction—Notice—43 Vic. ch. 8, sec. 14—Construction of.

Held, that a primary creditor having a claim agalnst a primary debtor within the jurisdiction of the Division Court can garnish a debt due by a third person to the primary debtor as to which, as between the primary debtor and the garnishee, a suit could not be maintained in the said court by reason of the amount being in excess of the jurisdiction.

Held, also, that the notice mentioned in sec. 14 of 43 Vic. ch. 8, O., refers to suits otherwise of the proper competence of the Division Court, but which have been brought in the wrong division, and that the section does not operate to give jurisdiction in default of notice as to

causes of action over which the Division Courts Act expressly enacts that these courts shall not have any jurisdiction. (See *ante* p. 82.)

R. M. Meredith, and *Aylesworth* for the primary creditor.

J. R. Roaf for the garnishee.

MONTREAL CITY AND DISTRICT SAVINGS BANK v. CORPORATION OF PERTH.

Debenture—Condition precedent—Presentation and surrender—Pleading.

In this case, which was reheard before the Full Court, the judgment of OSLER J., was affirmed.

Richards, Q. C. for the plaintiffs.

R. Smith, (of Stratford) for the defendants.

CARLISLE v. TAIT.

Chattel mortgage—Agent of bank—Affidavit of bona fides—Statement of knowledge of circumstances—Purchase under mortgage—Necessity to register bill of sale..

Where the agent of a bank makes the affidavit of *bona fides* to a chattel mortgage, it must appear either in the affidavit of the agent, or in some other way from the mortgage or other paper filed with it, that the agent is aware of the circumstances connected with the transaction.

Semble, per WILSON C. J., that the purchaser at a sale by the mortgagees, under the power of sale contained in the mortgage, leaving the mortgagor in possession, is protected so long as the mortgage under which he bought has the protection given it by registration; but when the term of the mortgage expires, the purchaser is no longer protected unless he takes actual possession, or procure and register a bill of sale from the mortgagee.

Falconbridge, for the plaintiff.

McClive, for the defendant.

MILL v. KERR.

Assignment for benefit of creditors—Deed of—Restriction to partnership creditors—Validity—Parol evidence.

G. and W. carrying on business under the name of G. & W., becoming indebted to several persons, and unable to pay their debts, executed a deed of assignment to the plaintiffs, "of all the estate of the partnership of G. & W., and of all the furniture, goods, chattels, and effects whatsoever (the personal apparel of himself and family excepted), now being in and about the dwelling-house and premises of the said G., to pay all the creditors of G. & W., who were in insolvent circumstances." It was proved that there were separate creditors.

Held, that the deed was void, as providing only for the partnership creditors, and that the intent of the parties that the deed was to include the separate creditors, could not be supplied by parol evidence.

Bethune, Q.C., for plaintiff.

Rose, for the defendant.

CANADA PERMANENT LOAN, &C., SOCIETY v. MCKAY.

Ejectment—Possession—Statute of Limitations.

In 1851 the defendant agreed to buy the land in question, his father, who lived in Scotland, sending the money to do so, though not to the defendant, but to another son, Dr. McKay, and by family arrangement the deed was taken in the name of the defendant's son, W., then about twelve years old, which was registered. The defendant and his family moved to the land, and resided there ever since, the family residence, with the garden and orchard about it, comprising in all about from two to four acres, being deemed to be the defendant's special property, and he had always exclusive possession thereof. W. resided with his father for several years and then went to the United States, but returned in 1869, when he conveyed in fee to his step brother, one H., who had full knowledge of all the facts and circumstances. The defendant also at the time complained to him, denying W's. right to sell. H. in 1870, and again in 1874, mortgaged the land to the plaintiffs, The land, except the house and plot, was worked on shares by H., the defendant, and another, and the defendant was assessed and paid the taxes on the whole lot. The plaintiff had no notice or knowledge of any of the circumstances, or of the defendant's possession.

The conveyance from W. to H., as also the mortgages from H. to the plaintiffs, were duly registered.

Held, that the plaintiffs, under their registered paper title were entitled to recover, except as to the house and plot, as to which the defendant, by his exclusive possession thereof, has acquired a title under the Statute of Limitations.

C. Robinson, Q.C., for the plaintiffs.
Maclennan, Q.C., for the defendant.

LEE v. PUBLIC SCHOOL BOARD OF TORONTO.

Public Schools—Trustees—Disqualifying contracts—Special case—Mandamus and injunction.

Held, OSLER J. doubting, on a special case, stated on the opinion of the Court of Chancery and transferred by order of a judge thereof to this court, that the fact of the Public School Board of the City of Toronto entering into an agreement with and purchasing their stationery and school supplies from a publishing company and having obtained gas from a gas company and insured their property in certain insurance companies, of which said companies the plaintiff was a stockholder, did not disqualify him as a trustee of the school board and render his seat vacant under 44 Vict. ch., 30, sec. 13, O.

Per OSLER J. that he was not satisfied that this Court could properly entertain the case, no fact being disclosed upon which the court could exercise the jurisdiction of granting an injunction at law under the Act relating to mandamus and injunctions, R. S. O., ch. 52, sec. 30, no wrongful act having been actually done by the school board, but merely an injury to the plaintiff's rights threatened, and that his doubt as to the disqualification arose from the fact of the contracts, especially those made with the publishing company, appearing to him to be rather within the mischief of this act, and that though not disposed to dissent he should feel himself at liberty to re-consider the question more fully should it again be presented in a form in which a binding judgment could be given.

H. J. Scott, for the plaintiff.
Howard, for the defendants.

CHANCERY.

Boyd, C.] [June 1.

FOX v. NIPISSING.
GOODERHAM v. NIPISSING.

Appointment of receiver.

After a decree had been pronounced directing the appointment of a receiver, but before the appointment was completed, the defendant company had made a payment to a creditor, which the petitioner, a judgment creditor, alleged to be a fraudulent preference, and moved for an order that the receiver should contest the question.

Held, that as the payment complained of took place before the actual appointment of the receiver it was more reasonable that those who were interested at that time as parties to the suit, and who objected to what had been done, should in person apply for the appropriate relief.

G. F. Blackstock, for the motion.
Maclennan, Q. C., contra.

Proudfoot, V. C.] [June 14.

KING v. DUNCAN.

Insolvent debtor—Chattel mortgage—Collusion—Judgment on breach of covenant and on common counts—R. S. O., ch. 118.

L. being in insolvent circumstances executed a chattel mortgage to D., who was cognizant of his state; and shortly after the execution thereof, in collusion with the mortgagee, but against an expressed prohibition, made a delivery or pretended sale of the goods to one M., which was contrary to the terms of the mortgage, and the mortgagee sued for breach of the covenant therein, adding the common counts; the mortgage having then three months to run.

Held, that the mortgage and judgment, so far as the covenant was concerned, were void, as being a fraud upon creditors.

The mortgagor was really indebted to the mortgagee upon an account, though the time for payment was extended three months by the mortgage.

Held, that the mortgagee was entitled to retain his judgment on the common counts as there was not any violation of the Act (R. S.

O., ch. 118,) in the debtor when sued not insisting on the fact of the credit not having expired, or that the debt had been merged in the mortgage.

W. Cassels, for plaintiff.
C. Moss, for defendant.

STARK v. SHEPPARD.

Vendor and Purchaser—Mortgage—Costs.

The plaintiff purchased a house and lot from defendant for $2000, paying $1000 in cash, and assuming a mortgage to a building society "on which $664 is yet unpaid," and giving a mortgage to the defendant for the balance. The defendant covenanted that he had not incumbered, save as aforesaid. Subsequent enquiries shewed that there were due the society seventy-one monthly instalments of $16.75, in all, $1189.25, and the plaintiff insisted that he was entitled to credit from the defendant for the difference between $664 and the latter sum. But;

Held, that the plaintiff was entitled to retain in his hands, only the cash value of the mortgage at the date of his purchase, if the society would accept it, if not then such a sum, as with interest on it, would meet the accruing payments.

The defendant by his answer, admitted an error in the computation of the amount due the society, and offered to pay the difference between the $664 and what he alleged was the cash value and costs up to that time.

Held, that in the event of the society accepting present payment of the cash value, the defendant was entitled to his costs of suit, subsequent to answer.

C. Moss, for plaintiff.
A. MacNab, for defendant.

WEBSTER v. LEYS.

Will, construction of— Vested interest.

The testator gave £1500 by his will to his widow, and in the event of her marrying again or dying intestate, this sum was at her death to be divided share and share alike among "my heirs (my brother's children"). The widow did marry again, and a daughter of W., a brother of the testator, died after the marriage but before the death of the widow, and so before the time for distribution.

Held, that the rule in such cases is, that a bequest in the form of a direction to pay, or to pay and divide at a future period, vests immediately if the payment be postponed for the convenience of the estate, or to let in some other interest; that the intention here was to let in the life estate of the widow, and that this was a share vested in the deceased child of W., which passed to her representatives.

D. Black, for plaintiff.
C. Moss, for defendant.

HUNTER v. CARRICK.

Patent of invention—Infringement of Patent.

In November, 1879, the plaintiff obtained a patent for new and useful improvements in bakers' ovens, which was expressed to be "In combination with a baker's oven, a furnace, 'D,' set within the oven but below the sole 'A.'" This patent he surrendered, and a new one issued in August, 1880, on the ground that the first was inoperative by reason of the insufficiency of the description. The new patent was for the unexpired portion of the five years covered by the first patent. The claim of invention, as set forth in the specification, was, 1st, In a fire pot or furnace placed within a baker's oven below the sole thereof, and provided with a door situated above the grate. 2nd, In a fire-pot or furnace placed within a baker's oven, provided with a door above the level of the sole of the oven, and connected with the said furnace by an inclined guide. 3rd, In a flue, 'H,' leading from below the grate 'B' to the flue 'E.' 4th. In a baker's oven, provided with a circular tilting grate situated below the sole of the oven, and provided with a door. 5th. In a cinder grate, 'F,' placed beneath the fire grate 'B,' in combination with a flue 'H.' The plaintiff, in his specifications, claimed all these as his inventions; in his evidence he claimed each of the combinations to be the subject of the patent.

Held (1), if the plaintiff was correct in the latter view, that the last four combinations being new, the first patent could not have been inoperative as to them; and the second patent in respect of these must be construed as an inde-

pendent one, issuing for the first time on its date, and as all other than the first combination had been used for upwards of a year prior to the patent, he was not entitled to a patent therefor. (2), that the 5th combination of previously known articles, as applied to a baker's oven, which was productive of results which were new and useful to the trade, was a subject of a patent.

Some of the devices were in use before the patent, but numerous witnesses engaged in baking testified that they never knew of the combination before the plaintiff's invention.

Held, that the defence of want of novelty failed.

Held, also, that the first combination in the patent of 1880 was such an amendment as is contemplated by section 19 of the Act 35 Vict., ch. 26.

The defendant's oven was completed early in July, 1880, and before the re-issue of the plaintiff's patent; they had in use the first and fourth combinations, and continued to use them after such re-issue.

Held, that there was not any remedy for the intermediate user, as the patent was then inoperative; but as to any subsequent infringment, the user under the defective patent could not operate as a defence.

The plaintiff having succeeded as to part only of his claim, no costs were given to either party up to the hearing.

A reference as to damages having been directed, subsequent costs were ordered to abide the result.

W. Cassels, for plaintiff.

McMichael, Q. C., for defendant.

DICKSON v. MCMURRAY

Joint Stock Company—Election of directors—Scrutineers.

At a meeting of the shareholders of a company, the capital stock of which was held by a few, a chairman was elected by a majority of the votes of those present, without regard to the stock held by them. Two of the shareholders, who were also provisional directors, and who were candidates for re-election, were appointed scrutineers in the same manner, and directors were then elected, excluding the plaintiff. The plaintiff was President of the Company, and held a large amount of stock, sufficient with those who were favourable to him, to have controlled the vote if it had been taken according to shares. It was the duty of the scrutineers to decide as to what votes were valid, and they also, with the aid of legal advice, interpreted, an instrument under which the plaintiff had advanced a large sum of money to start the company, and which provided for the future disposition of the shares of the company held by the plaintiff as a security for his advances.

Held, that the duty of the scrutineers was so plainly in conflict with their interest as candidates for the directorate that they were disqualified from so acting, and the election was set aside, and a new election ordered.

W. Cassels, for plaintiff.

Maclennan, Q. C., for defendant.

VINDEN v. FRASER.

Fraudulent conveyance—Chose in action.

The defendant W. was married in 1849 without any settlement. He was appointed and acted as executor of the estate of his wife's father, and acting on behalf of his wife he received large sums from the estate which he borrowed from her:—£7,600 before 1859, and £2,800 in 1879; all such moneys being charged to the wife in the books of the estate. The conveyances impeached in this suit were of lands which, with other property, had been purchased by the husband with the moneys so received on account of his wife, the deeds for which, however, had been taken in the name of W. The mother of his wife had frequently requested W. to settle these properties on the wife, and which he promised to do, and in 1873, when he with his wife was about to visit Europe, W. did convey the property in question to the wife. In 1872 and 1873 W., jointly with one C., entered into extensive speculations and made a considerable amount of money. In 1873 W. endorsed C.'s note for $10,000, which C. discounted, and the same remained unpaid, and W. in 1874 gave his cheque to the plaintiff for $4,000 on which this suit was instituted.

Held, (1) that as to the £7,600, W. having acted for his wife in obtaining this money from her father's estate, and having never made any

claim thereto in exercise of his marital right, having borrowed it only, which was established by the testimony of the wife's mother, there was no reduction into possession by the husband of the money. (2) And as to the £2,800 the *onus* was upon the plaintiff to establish a gift to the husband by the wife, which he failed to do: on the contrary, the evidence showed it to have been a loan.

When W. incurred the liability for C., he was in affluent circumstances, and continued to be so for a year after the conveyance impeached in this suit; after which period the liability to the plaintiff was incurred:

Held, that the plaintiff was not, in respect of his own claim, in a position to impeach the conveyance, and could not be in a better position than the prior creditors, who clearly could not have avoided the transaction as the settlement was made when the settlor, in a pecuniary point of view, was well able to make it.

Maclennan, Q.C., for plaintiff.
Benson, Q.C., for defendant.

CHANCERY CHAMBERS.

Boyd, C.] [May 31.

TRAVISS v. BELL.

Production—Lunatic plaintiff.

Where a person of unsound mind, not so found, sues by a next friend the usual præcipe order to produce is sufficiently obeyed by the affidavit of the next friend, and if the defendant is willing to accept the next friend's affidavit, he is bound to make it.

Ewart, for plaintiff.
H. Cassels, for defendant.

Ferguson, V. C.] [June 16.

MACDONALD v. WORTHINGTON.

Appeal from decree—Money in court—Interest on—Security for.

A decree was made which, among other things, directed the payment out to the defendant, of a large sum of money, paid into court pending the suit. The plaintiff appealed from the decree, and, under an order allowing him to do so, paid into court four hundred dollars as security for the cost of appeal. Subsequently an order was made that, upon the plaintiff's furnishing security to the amount of two hundred dollars, for the difference between court interest and the legal rate, the proceedings be stayed so far as the order for payment out of the money in court was concerned. From this order the plaintiff appealed.

Held, affirming the decision of the Referee, that he had power, on making the order, to impose such a condition; and that inasmuch as the money remained in court for the plaintiff's own protection, it was not unreasonable that such security should be given.

A. M. Macdonald, for plaintiff.
H. Cassels, for defendant.

Boyd, C.] [June 22.

FULLER v. MACLEAN.

Report—Long vacation—Notice.

Held, affirming the order of the Referee that a Report made during the long vacation in contravention of G. O., 425 is, as against a party who has had no notice of the proceedings, null and void.

Boyd, C.] [June 22.

RE IDINGTON v. MICKLE.

Costs—Solicitor—Taxation—R. S. O. ch. 140.

A bill between solicitor and client will not be referred to the Master in ordinary for taxation against the provisions of R. S. O., ch. 140 sec. 33, which enacts that it shall be referred to the proper officer in the Co., in which any of the business charged for was done. Upon payment of all costs of application to date, the solicitors to be at liberty to amend their bill.

H. Cassels, for the motion.
Hoyles, contra.

Proudfoot, V. C.]

RE COLTON.

FISHER v. COLTON.

Administration—Suretyship—Executor de son tort—Practice.

It is competent to the Court on a proper case being made, to appoint a personal representative to an estate (or to dispense with one altogether) and then to direct the administration of the estate.

Where the claim against a deceased's estate is one arising out of a contract of suretyship, the Court will not, unless by consent, direct its investigation except on a bill filed.

Semble.—That administration of an estate will not be ordered by the Court where no legal personal representative has been appointed or dispensed with, though an executrix *de son tort* is before the Court.

Hoyles, for motion.
H. Cassels, contra.

Boyd, C.] [June 22.

IN RE FERGUSON.

Custody of infant—Imbecility of parent.

While the undoubted natural right of a father to the custody and guardianship of his child is undisputed, and while the law imputes ability and inclination to the parent to perform his duty to his child, the right is yet founded upon his actual capacity to discharge this duty, and under certain circumstances the superior claim to the custody of his offspring may be suspended while the incapacity lasts.

A child, three years old, was placed with its maternal grand-parents, who were childless, after the death of its mother. They were comfortably off, treated the child kindly, were willing to educate it, and the grandfather had made a will, in its favor. The father was suffering, and was much enfeebled, both mentally and physically, from the effect of paralysis, and on examination he did not seem to comprehend what the effect of these proceedings were. He had been supported by the persons in whose custody the child was for some time, and a scheme for the future welfare of the child was proposed on his behalf.

The Court refused to make any order changing the position of the parties, as it appeared to be more for the welfare of the child that the father should not have the custody.

Counsel for the respondents requested that the petition be dismissed, as it would appear on the file as a pending proceeding if no order was made, whereupon an order was made dismissing the petition.

Hoyles, for the petition.
Symons, contra.

CORRESPONDENCE.

Our Reports.

To the Editor of the CANADA LAW JOURNAL.

SIR,—Except for your valuable paper it would be difficult to know to the extent we do what the practice is in many points, and what decisions have been arrived at in other matters of interest. This should not be so, with the large staff of reporters we have. It is not fair to the practitioner in Toronto, but with the facilities of attendance at Court possessed there it is a matter of small moment compared to the position of the gentlemen in the country. The usual rule appears to be that no case is reported or even noted unless a judgment in writing be given. This view pervades the reporters from Chambers to the Court of Appeal. A case may be elaborately argued by counsel learned in the law who have admirably presented their case. The point may be one which has but recently engaged peculiarly the time and attention of the Judge, and who has gone over previously, and well considered each question raised by counsel, and therefore feels that nothing but delay can be gained by postponing judgment, thereupon proceeds and disposes of the case in such a manner that both parties are compelled to accept it, as laying down truly the law, and correctly stating the facts; and yet no note is to be found in this decision, as the Judge did not put the case under his pillow, and after sleeping into a state of forgetfulness of the facts and mistiness as to the law, for a year, elaborate a preparation in writing which favours a considerable item in our unread reports. There are cases of great moment decided, from the Practice Court up to the highest Court of our Province, which should have a place in our regular reports, but which are passed over unnoticed. It is a matter of great moment when, as it is with us, a new system is about to be introduced, that all the decisions should be speedily and accurately reported. With the press of work, it is not resonable to expect that these decisions should be in writing. Our present reporters should have the option, either to turn over a new leaf

and report unwritten judgments, or else they should be replaced by men that will do so.

Yours truly,

BARRISTER.

[See remarks on p. 253. ED. L. J.]

Law Society curriculum.

To the Editor of the CANADA LAW JOURNAL:—

SIR,—I wish to call your attention to the alterations made by Convocation this month in the curriculum of the Law Society.

A great many students take "Fitness" and "Call" during the same term, consequently they require more than six months' notice, especially when the changes are many.

I therefore respectfully call the attention of the Benchers to this matter, and would urge an extension of time, so far as attorney and barrister examinations are concerned, until next May.

It is evident that the new Benchers do not recognise the N. P., for they have struck off the two Canadian books on the list for Call.

I am, &c.,

A STUDENT.

COURT ANNOUNCEMENTS.

COURT OF CHANCERY.—Between the 21st August and 1st September the Court will not sit for the hearing of any cause or application except such as may be disposed of in vacation. During this period the Master's office will be open each day (Sundays excepted) from 10 to 12 a. m., for the purpose of making appointments. The other offices will be open during the same hours for the transaction of such business as shall not require the attendance of the opposite party, and as may be transacted in vacation.

Vacation business.—During vacation applications of an urgent nature are to be made to Vice-Chancellor Ferguson. He will be at Osgoode Hall at 11 on each Tuesday. Papers relating to applications are to be left with the Registrar or Assistant Registrar on previous Fridays. Applications for leave to serve notice of motion may be made to the Registrar or Assistant-Registrar.

In any case of urgency the brief of counsel is to be sent to the Vice-Chancellor, accompanied by copies of the affidavits in support of the application, and also by a minute on a separate sheet of paper signed by counsel, of the order he may consider the applicant entitled to, and an envelope capable of receiving the papers, addressed as follows;—To the Registrar of the Court of Chancery (vacation business), Osgoode Hall, Toronto—containing stamps for postage.

On application for injunctions or writs of *ne exeat* Provinces in additon to the above there must also be sent an office copy of the bill.

The papers sent to the Vice-Chancellor will be returned to the Registrar's office.

The Vice-Chancellor's address can be obtained on application at the Registrar's office.

By order of the Court.

GEO. S. HOLMESTED.

Registrar.

June 27th, 1881.

BOOKS RECEIVED.

A manual of the practice of the Supreme Court of Judicature, England; by John Indermaur. London: Stevens & Haynes, Bell-yard, 1881.

A collection of Latin Maxims, literally translated. Steven & Haynes, Bell-yard, 1881.

1881.—CHANCERY AUTUMN CIRCUITS.

Vice-Chancellor Ferguson.

Toronto	Tuesday	1st Nov

EASTER CIRCUIT.

The Chancellor.

Lindsay	Monday	3rd Oct.
Peterborough	Friday	6th Oct.
Cobourg	Tuesday	11th Oct.
Belleville	Friday	14 Oct.
Cornwall	Thursday	3rd Nov.
Ottawa	Tuesday	8th Nov.
Brockville	Tuesday	15th Nov.
Kingston	Friday	18th Nov.

WESTERN CIRCUIT.

Vice-Chancellor Proudfoot.

Stratford	Monday	12th Sept.
Goderich	Thursday	15th Sept.
Sandwich	Tuesday	20th Sept.
Chatham	Friday	23rd Sept.
Woodstock	Thursday	29th Sept.
Walkerton	Friday	21st Oct.
Sarnia	Tuesday	25th Oct.
London	Thursday	27th Oct.

HOME CIRCUIT.

Vice-Chancellor Ferguson.

Guelph	Tuesday	6th Sept.
Brantford	Tuesday	13th Sept.
Simcoe	Friday	16th Sept.
St. Catharines	Wednesday	21st Sept.
Barrie	Tuesday	4th Oct.
Owen Sound	Tuesday	11th Oct.
Whitby	Tuesday	18th Oct.
Hamilton	Friday	21st Oct.

AUTUMN ASSIZES.

EASTERN CIRCUIT—CHIEF JUSTICE OF C. P.

1 Pembroke	Tuesday	20th Sept.
2 Perth	Monday	26th Sept.
3 Ottawa	Monday	3rd Oct.
4 L'Original	Monday	17th Oct.
5 Cornwall	Monday	24th Oct.

MIDLAND CIRCUIT—CHIEF JUSTICE OF Q. B.

1 Belleville	Monday	12th Sept.
2 Kingston	Monday	26th Sept.
3 Brockville	Monday	10th Oct.
4 Picton	Tuesday	18th Oct.
3 Napanee	Tuesday	25th Oct.

VICTORIA CIRCUIT—MR. JUSTICE ARMOUR.

1 Brampton	Tuesday	13th Sept.
2 Whitby	Monday	19th Sept.
3 Lindsay	Monday	26th Sept.
4 Peterborough	Monday	3rd Oct.
5 Cobourg	Monday	24th Oct.

BROCK CIRCUIT—MR. JUSTICE PATTERSON.

1 Orangeville	Tuesday	20th Sept.
2 Owen Sound	Monday	26th Sept.
3 Walkerton	Monday	3rd Oct.
4 Woodstock	Monday	10th Oct.
5 Goderich	Monday	17th Oct.
6 Stratford	Tuesday	25th Oct.

NIAGARA CIRCUIT—MR. JUSTICE MORRISON.

1 Milton	Tuesday	20th Sept.
2 Hamilton	Tuesday	27th Sept.
3 St. Catharines	Tuesday	11th Oct.
4 Welland	Tuesday	18th Oct.
5 Cayuga	Tuesday	25th Oct.

WATERLOO CIRCUIT—MR. JUSTICE GALT.

1 Barrie	Monday	12th Sept.
2 Guelph	Monday	26th Sept.
3 Brantford	Monday	10th Oct.
4 Berlin	Monday	17th Oct.
5 Simcoe	Monday	24th Oct.

WESTERN CIRCUIT—MR. JUSTICE BURTON.

1 London	Monday	19th Sept.
2 St. Thomas	Wednesday	28th Sept.
3 Sarnia	Tuesday	11th Oct.
4 Sandwich	Tuesday	18th Oct.
5 Chatham	Tuesday	25th Oct.

HOME CIRCUIT—MR. JUSTICE CAMERON.

1 Toronto (Assize and Nisi Prius.)	Tuesday	20th Sept.
2 Toronto (Oyer & Terminer, etc.)	Tuesday	25th Oct.

MR. JUSTICE OSLER will remain in Toronto to hold the Court each week, and Chambers.

FLOTSAM AND JETSAM.

CHARGING A JURY.—In a very interesting review of Judge Thompson's monograph, entitled "Charging the Jury," which recently appeared in the *Irish Law Times*, we find the following amusing illustration of how not to charge the jury: "The validity of a will was being tried in a Scottish court, when, the foreman of the jury having begged to be informed whether importunate solicitation was to be considered as undue influence, a learned judge thus impressively delivered himself: "It is only right, Mr. Foreman, that the jury should have recourse to this bench in all difficult and doubtful matters—and I trust, gentlemen of the jury, what I and my very accurate brother shall address to you, will afford all the necessary facilities necessary rightly to understand the issue you are to try. And, gentlemen of the jury, never did I address a set of men with greater satisfaction—men whose enlightened minds are capable of receiving, and of profiting by the information which they derive from the court. No men are more highly or more justly respected in the county from which they came—I know every one of you—and I take this opportunity to return my sincere thanks to the High Sheriff of the county of Galloway, for impaneling so respectable a jury. No cause would lose by being tried by any individual amongst you; and it must be satisfactory in the highest degree to the parties at issue to have their property in the hands of such men. Nor, gentlemen of the jury, can I sufficiently congratulate you, when I see the man I do at your head. I tell you what, Mr. Foreman, you are one of the cleverest men in the country, and the glory of our age and nation—you know you are—and there is no man in the community more capable of resolving the present difficulty than yourself—no man in the community of a sounder or more enlightened understanding—no man has better opportunities—no man is furnished with more ample means to assist his researches after truth. Gentlemen of the jury, when you go together to try this very important question you will receive such information from that man, that it would be strange indeed—with the legal assistance you derive from the bench—you could possibly fail of doing justice to the parties at issue in this cause. Your library, Mr. Foreman, is one of the most extensive and best chosen in the country; some of your volumes are really very neatly gilt (you know I admire them, I am very fond of books); and you are a man of penetrating and inquisitive mind; and with the information you possess, there is no man, I repeat it, in the community more fit for the position you now fill. I do not think, gentlemen of the jury, I need add anything further you will go together; and I have no doubt your decision will be equally satisfactory to both parties—equally an honor to your country and to yourselves.' 'Gentlemen of the jury,' then added the puisne judge, 'after the very exhaustive, judicious and accurate manner in which my laird has expressed himself, it will be the less necessary for me to take up your time in endeavoring to throw new light on what has already been so fully and so ably discussed. Gentlemen of the jury, importunate solicitations means nothing; but if you tease a man out of his life, and he afterwards makes a will in your favor, it ought, I think, to have some weight. Gentlemen of the jury, you are to try whether importunate solicitation be undue influence or not; you are the judges of the fact—the law on the subject I need not go more largely into, after what you have heard from my laird."

Law Society of Upper Canada.

OSGOODE HALL.

EASTER TERM, 44TH VICT.

During this Term the following gentlemen were called to the degree of Barrister-at-Law :—

George Bell, with honors; John O'Meara, Charles Henry Connor. George Macdonald, John Birnie, jr., Charles Egerton Macdonald, Howard Jennings Duncan, Stewart Campbell Johnstone, Lendrum McMeans, William Boston Towers, Francis Edward Galbraith, Charles Wright, John Kelley Dowsly, Chas. Herbert Allen, Charles Elwin Seymour Radcliffe, James Leland Darling, John Clark Eccles, George William Baker, Hedley Vicars Knight, George Ritchie.

(The names are placed in the order of merit).

And the following gentlemen were admitted into the Society as Students-at-Law, namely :—

GRADUATES.

Adam Carruthers, B.A., James Alexander Hutchinson, B.A., George Frederick Lawson.

MATRICULANTS OF UNIVERSITIES.

John L. Peters, Morris Johnson Fletcher, Francis Cockburn Powell, Toronto University.

JUNIOR CLASS.

Herbert Gordon Macbeth, Alson Alexander Fisher, William Edward Sheridan Knowles, Thomas Hobson, Robert Alexander Dickson, Peter D. Cunningham, Alexander McLean, William Thomas McMullen, Miron Ardon Everetts, William John McWhinney, Richard Armstrong, Alexander Duncan McLaren, Edward Corrigan Emery, John Craine, Joseph McKenzie Rogers, W. Arthur Ernest Kennedy, Geo. Herbert Stephenson, Arthur W. Wilkin, Walter George Fisher.

And the examination of William Lesslie Beale was allowed him as an Articled Clerk.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

1881.
- Ovid, Fasti, B. I., vv. 1-300; or, Virgil, Æneid, B. II., vv. 1-317.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History—Queen Anne to George III.
- Modern Geography—N. America and Europe.
- Elements of Book-keeping.

In 1882, 1883, 1884 and 1885. Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

Students-at-Law

CLASSICS.

1881.
- Xenophon, nabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero in Catilinam, II., III., IV.
- Ovid, Fasti, B. I., vv. 1-300.
- Virgil, Æneid, B. I., vv. 1-304.

1882.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum, (B. G. B. IV. c. 20-36, B. V., c. 8-23.)
- Cicero, Pro Archia.
- Virgil, Æneid, B. II., vv. 1-317.
- Ovid, Heroides, Epistles V. XIII.

1883.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum.
- Cicero, Pro Archia.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Heroides, Epistles V. XIII.

1884.
- Cicero, Cato Major.
- Virgil, Æneid, B. V., vv. 1-361
- Ovid, Fasti, B. I., vv. 1-300.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.

1885.
- Xenophon, Anabasis, B. V.
- Homer, Iliad. B. IV.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid, Bb. I., II., III.

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DIARY FOR JULY.

1. Fri...Long vacation begins. Dominion day.
3. Sun...*3rd Sunday after Trinity.*
4. Mon..County Court Terms (except York) begin. Heir and Dev. sitt. begin.
7. Thurs.Gen. Simcoe first Lieut.-Gov. of U. C., 1792.
8. Fri...Cyprus ceded to England, 1878.
8. Sat...County Court Term ends.
10. Sun...*4th Sunday after Trinity.*
11. Mon..Canada invaded by U. S., 1813.
14. Thurs.W. P. Howland, first Lieut.-Gov. of Ontario, 1868.
15. Fri...Manitoba entered Confederation, 1870.
17. Sun..*5th Sunday after Trinity.*
19. Tue..Heir and Devise sittings end.
20. Wed..British Columbia entered Confederation, 1871.
23. Sat...Union of Upper and Lower Canada, 1840.
24. Sun..*6th Sunday after Trinity.* Canada discovered by Cartier, 1534.
25. Mon..Battle of Lundy's Lane, 1813.
26. Tue..Jews first admitted to Ho. of Commons, 1858. Dr Robitaille, Lieut.-Gov. of Quebec, 1879.
29. Fri...First Atlantic Telegraph laid, 1866.
30. Sat...Governm't of U.C. removed from Niagara to York, 1793.
31. Sun ..*7th Sunday after Trinity.*

TORONTO JULY 15, 1881.

THERE is no reason why editors of legal journals should not have some vacation as well as their brethren. Besides, the legal mind should on this occasion be feeding on "Maclennan" and "Taylor and Ewart." We propose, therefore, only to publish this journal during Vacation as circumstances may require.

THERE seems a disposition on the part of the authorities at Osgoode Hall, as well as the profession, more rigidly than heretofore to keep sacred the days devoted to the Long Vacation. One slight exception was in the delivery of judgments by the Court of Appeal. Though this was not satisfactory to some few counsel, it was probably otherwise to the successful suitor. It has been suggested, however, that the Court did not act unwisely, as it might have been thought dangerous for the judges to have carried about in their persons so much condensed learning during the hot weather. In this view we must be grateful that there was a safe delivery early in the holidays.

THE judgments delivered on this occasion were, as a rule, enormously long, or, at least, they seemed to be so, perhaps owing to the frailty of human nature in being compelled to listen to them in the dog days. Some of the cases, however, were very important, notably the *cause celebre* of *McLaren* v. *Caldwell*, in which the Court fell foul of the recent decision of Vice-Chancellor Proudfoot. The judgment of the Chief Justice, whether right or wrong, struck the listener as being in the best style of that able jurist. The tendency seemed to be in the direction of a general upsetting of the judicial apple-carts of the Courts below. In *Trust and Loan Co.* v. *Laurason*, however, Mr. Justice Osler came to the rescue of the Queen's Bench, and in a vigorous judgment dissented from Burton, Patterson, and Morrison, JJ., as to the right of the plaintiffs to distrain as for rent against their mortgagee. "Hard cases make bad law," and it is by no means as clear to us as it was to the majority of the Court that the terms of the mortgage did not give the right contended for.

THE following is the order in Council, providing for the distribution of business at Osgoode Hall, under the Judicature Act:—

That Mr. Dalton shall be Master in Chambers, at a salary of $3,000, and Mr. W. B. Heward and Mr. Arnoldi Clerks in Chambers.

That Mr. Stephens shall succeed Mr. Dalton as Clerk of the Crown and Pleas of the Court of Queen's Bench, at a salary of $2,000 per annum, and shall be called "Registrar of the Queen's Bench Division;" and it shall be part of his duty from time to time, on the request of the Master in Chambers or of a Judge of the High Court, to sit with or for such Master.

That Mr. Jackson retain his office as Clerk of the Crown and Pleas of the Court of Common Pleas, and that he be designated "Registrar of the Common Pleas Division."

That Mr. George Holmested shall be Registrar of the Chancery Division and Senior Judgment Clerk of the High Court.

That Mr. A. F. Maclean be Assistant Registrar of the Chancery Division and Junior Judgment Clerk of the High Court, at a salary of $1,400 per annum, to be reckoned from the 1st of July next.

That Mr. Taylor be Master in Ordinary of the Supreme Court at his present salary.

That Mr. Thom and Mr. Clark be the Taxing Officers, and that they be each paid $1,600 per annum.

That Mr. Lee retain his office of Clerk of Records and Writs, and that his salary be $1,200 per annum, the increase to be reckoned from the 1st January last.

That Mr. Alexander Macdonell, Clerk of the Queen's Bench, be paid $1,400 per annum.

That Mr. Semple, Entering Clerk in Chancery, be paid $700 per annum.

That Mr. Stewart be transferred from the office of the Clerk of Process to the Accountant's office.

That this order shall take effect on and from the 22nd day of August next, except the provisions thereof increasing salaries, which shall take effect from the time hereinbefore particularly stated.

THE *Canada Gazette* of July 9th publishes the order of Her Majesty in Council carrying into effect the recent extradition treaty between Great Britain and Switzerland. The crimes for which extradition is to be granted are as follows:—

1. Murder (including infanticide) and attempt to murder.
2. Manslaughter.
3. Counterfeiting or altering money, uttering or bringing into circulation counterfeit or altered money.
4. Forgery, or counterfeiting, or altering, or uttering what is forged, or counterfeited, or altered; comprehending the crimes designated in the Penal Codes of both States as counterfeiting or falsification of paper money, bank notes, or other securities, forgery, or falsification of other public or private documents, likewise the uttering or bringing into circulation, or wilfully using such counterfeited, forged, or falsified papers.
5. Embezzlement or larceny.
6. Obtaining money under false pretences.
7. Crimes against bankruptcy law.
8. Fraud committed by a baillee, banker, agent, factor, trustee, or director, or member or public officer of any Company made criminal by any law for the time being in force.
9. Rape.
10. Abduction of minors.
11. Child stealing or kidnapping.
12. Burglary, or house breaking, with criminal intent.
13. Arson.
14. Robbery with violence.
15. Threats by letter or otherwise with intent to exhort.
16. Perjury or subornation of perjury.
17. Malicious injury to property, if the offence be indictable.

The extradition is also to take place for participation in any of the aforesaid crimes, as an accessory before or after the fact, provided such participation be punishable by the laws of both contracting Parties.

LEGAL EDUCATION.

The subject of legal education is a difficult one, and has engaged much time and attention and will continue to do so. The Law School, rightly or wrongly, was abolished; but the desirability of some provision of a kindred nature is generally admitted. This feeling has found expression in various ways. The most important is the plan proposed by the treasurer of the Law Society and adopted

by the Benchers as set out in the proceedings of Convocation published last number. (ante p. 263.)

Whilst this scheme presents many advantages, it does not, in the opinion of some, quite meet the requirements of the situation. It proposes the establishment of legal and literary societies in places where a sufficient number of barristers and students care to organize them. The objects of these associations are "the extension of legal knowledge and the cultivation of the powers of reasoning, speech, and composition of the members by the delivery of lectures by barristers on some of the more important branches of the law and examinations thereon, by the preparation and reading of essays and by arguments on legal questions." To stimulate students in their studies, prizes in the shape of law books are to be given to successful competitors.

The result of this plan will practically be, if carried out, the establishment of a number of small centres of partial education in some of the larger cities and towns in Ontario. These aids will be of benefit to those students who reside in the places where they are established, but they will be of little more use to the great mass of students than if the same course of instruction were given in Toronto, inasmuch as the students are scattered throughout the numerous towns and villages in the Province. The course of study also cannot, in the nature of things, be so complete in these smaller efforts as it might be made, at the same aggregate expense and labour, in one central combined school of learning. Others again amongst the students say that what they want is not prizes, but a reduction of the term of apprenticeship to hard-working students, successful in competitive examinations. We are not prepared, however, to admit this principle under all circumstances. Graduates are in a very different position from those who have not had a thorough school training. But whatever may be thought of this matter, a petition has been largely signed both by the profession and students, asking for the consideration of a scheme which has been roughly formulated as follows :—

1. That courses of lectures be given by barristers to students for terms commencing on the first day of October, and ending on the first day of April in the following year, upon subjects from time to time prescribed.

2. That students who have not entered their fourth year before the commencement of any course of lectures be termed Junior Students, and all other students who have entered or passed their fourth year before the commencement of any course as aforesaid be termed Senior Students.

3. That one year be the maximum time to be allowed as a reduction from the regular course of five years, and six months reduction for any graduate for any examination or examinations.

4. That fifty-five per cent. be the minimum of marks in any Junior Examination, and that six months' reduction be allowed from the regular course of five years to successful candidates.

5. That sixty-five per cent. be the minimum of marks on any Senior Examination, and that a further reduction of six months' time be allowed to successful candidates.

6. That those who are now Senior Students be allowed to enter for either or both examinations.

7. That the examinations for Junior and Senior clerks be distinct and separate, and that only Senior Students be so allowed to enter for Senior Examinations.

Without further consideration we should not offer any decided opinion as to the merits of the plan above proposed; but we are satisfied the Benchers will be only too glad to receive and discuss this or any other reasonable suggestion that would seem to help in moulding into shape some fair, workable scheme for

the efficient education of those entering the legal profession.

LORD JUSTICE JAMES.

The Right Honorable Sir William M. James, Lord Justice of Appeal, who died in London on the 7th ult., was born in Wales, was educated at Glasgow University, was a pupil of Sir Fitzroy Kelly, and was called to the Bar in 1831. In 1869 he was made Vice-Chancellor, and the next year raised to the Court of Appeal. The *Law Journal* thus speaks of the late Judge:—

"The late Lord Justice was a judge of the best class—a class which, unfortunately, by reason of the conditions upon which judges are made, is never too numerous. We have frequently seen on the bench men as highly gifted as Lord Justice James, and as highly cultivated; but it is a common observation of judges thus highly qualified that they would appear to have applied their talents to almost every branch of knowledge except the science of law. There are often men with as much learning as the late Lord Justice to be found among the judges, but they are too frequently mere lawyers whose lightest reading is Butler's 'Hudibras.' Lord Justice James was a man of great powers of intellect widely applied, but concentrated on the law. He did not, like some judges who have been placed in eminent positions on the bench, look upon his duties as a somewhat tiresome necessity of his situation, or as ground upon which he must tread warily through consciousness of great gaps in legal knowledge or want of sympathy with legal modes of thought He loved the law, and he was confident of his legal powers. He applied a considerable knowlege of life, great powers of expression, and a vivid imagination to the illustration of the subject in which he was entitled to have a voice. Few judges have been so thoroughly imbued with the great first principle, from which there are on the bench so many temptations to depart, that law is essentially a science of general appplication, and not a patchwork to be made up piece by piece as occasion arises. A judge of this character fills satisfactorily the position in the social economy to which he is called, and his loss cannot easily be replaced.

The solid merits of Mr. James were sometime in coming to the front. He was a stuff gownsman for twenty-two years, and it was sixteen years more before he became a judge. A want of fluency in speaking, and a candour of mind which denied him the advocate's faculty of seeing only one side at a time, impeded his success at the bar. Those who heard him on the bench were surprised at his want of success as an advocate. But, in fact, his speaking, as has been said of others, was like a man who is choosing among a bundle of sticks for the proved weapon, and who always finds the right one, and not that of an orator capable of carrying an audience away with him. His critics might have said of him that he was a judge at the bar and an advocate on the bench; so forcible and imaginative are some of his judgments. Probably he was sometimes carried beyond the bounds of the strictest judicial propriety by an indulgence in the power of stinging language, of which he was a master. A good example of his judicial style is supplied by a passage from the case of *The Canadian Oil Works Company*, 44 Law J. Rep. Chanc. 723.

Although possessing a full knowledge of case law no judge set his face so strongly as Lord Justice James against the practice, from which equity jurisprudence has suffered so much, of deciding according to the direction in which half a dozen previous cases, none of them directly in point, seem to suggest. Lord Justice James, in fact, although no judge was more full in giving his reasons and dealing with all the arguments advanced, arrived at his conclusion instinctively His habit of making up his mind early in the argument led to a noticeable judicial fault. So soon as he had made up his mind, he was apt to be impatient to deliver himself of it; and it was sometimes difficult to get a further hearing. Such faults as a tendency to over-colouring in language, due to a strong imagination, and an occasional liability to impatience of argument, due to a desire to save public time, were largely outweighed by the Lord Justice's judicial excellences. Few judges were more honest than he on the bench. We do not speak of moral honesty, which is happily common to all, but of the rarer virtue of intellectual honesty. He never sought to get rid of a case upon some trifling technicality, but, if possible, pronounced on the merits. The phrase 'unnecessary to decide' was seldom in his mouth; and conscious of his own powers, he even went out of his way to untie judicial knots. His name will be added to legal history as that of an intellectual giant who did much to give breadth, strength, and uniformity to the system of English jurisprudence."

SELECTIONS.

NOTES OF HORSE CASES.

This week we note a group of horse cases. In *Kellogg* v. *Lovely*, Michigan Supreme Court, April 27, 1881, 8 N. W. Rep. 597, the defendant, in October, 1878, sold plaintiff a mare, buggy, and harness, taking his note, with a mortgage upon the property, for the entire amount of the purchase price. At the time of the sale the mare was with foal, which was born the June following. July first the mortgage became due, and not being paid, the mortgagee took posession of all the property, including the colt. *Held*, that the mortgage gave him a right to the colt, and he was not guilty of trespass in so taking it. After commenting on the general doctrine that the young of animals under mortgage are subject to the mortgage, and observing that this holding may have originated in the doctrine that the increase belongs to the owner of the mother, and the mortgagee of chattels is the legal owner, the court observed: "The case before the court belongs to a peculiar and exceptional class, and it may be disposed of without bringing into question the general doctrine. As previously stated, the mare was carrying her colt when Lovely sold her, and the plaintiff, not paying anything whatever, gave back at the same moment a chattel mortgage for the entire price. There was no interval of time between the sale and the mortgage. Each took effect at the same instant. The whole was substantially one transaction. Now it is a rule of natural justice that one who has gotten the property of another ought not as between them to be allowed to keep any part of its present natural incidents or accessories without payment, and that the party entitled should have the right to regard the whole as being subject to his claim. The one ought not to suffer loss, nor the other effect a gain, through a mere shuffle, and whatever belongs to the thing in question, as the young the dam is carrying, belongs to her, ought to be as fully bound as the thing itself, unless indeed there are circumstances which imply a different intention. It is not unreasonable to construe the act of these parties by these principles and to consider that when Lovely sold the mare without receiving any thing down, and Kellogg gave back the mortgage for the whole purchase price to be due before the colt, according to the ordinary course of things, would be old enough to be separated from the mare, it operated as well to hold the colt as to hold the mare herself. The intendment is a fair and just one that the security was to be so far beneficial to Lovely as to preserve to him the right to claim at the maturity of the mortgage the same property he would have had in case he had made no sale." That the mortgagee of animals with young is the owner of the increase was held in *Forman* v. *Procter*, 9 B. Monr. 124; *Thorpe* v. *Cowles*, 7 N. W. Rep. 677.

The next case, *Gunderson* v. *Richardson*, Iowa Supreme Court, April 22, 1881, 8 N. W. Rep. 175, involved a horse trade on Sunday. It holds that an action for damages, under the statute, for knowingly offering to trade a horse diseased with glanders, cannot be maintained when the trade was made on Sunday. After laying down the doctrine that the law will not intervene between parties to an illegal contract, to help one to damages against the other for matters growing out of it, the court observed: "Counsel for appellee contends, however, that this action is not for fraud or breach of warranty, but that it is an action for damages against the defendant for "a crime," and that "the defendant cannot escape liability by asserting that his unlawful and criminal act was committed on Sunday." "It appears to us that by all the allegations of the petition the plaintiff bases his right to recover by reason of the contract for the exchange of the horses. To support these allegations it is absolutely essential that he show that the exchange was actually made. He could establish his damages in no other way. It was therefore incumbent on him to show the contract as he alleged it to be. This he could not do, for the law leaves the parties to such contracts where they place themselves. In other words, as appears from the petition, both these parties were active participants in violating the law by entering into a contract on Sunday. The plaintiff claims that, in making the contract, defendant defrauded him to his damage. The law will not afford him redress, and it will not avail the plaintiff to assert that the defendant, in making the Sunday contract, also violated another provision of the Criminal Code. The case, it appears to us, is essentially different from the case of one travelling on Sunday, and being assaulted by another, or injured by a defect

in the highway. In the latter class of cases the plaintiff does not seek to enforce an illegal contract, or to recover damages growing out of such contract, to which he was an active par.y; nor, as is said in *Schmid* v. *Humphrey*, 48 Iowa, 652; S. C., 30 Am. Rep. 414, 'is he seeking to enforce any right obtained by the breach of any law.'"

The next case also rose from a Sunday horse trade. In *Kinney* v. *McDermott*, Iowa Supreme Court, April 20, 1881, 8 N. W. Rep. 148, plaintiff and defendant made a horse trade on Sunday, defendant leaving his horse with plaintiff, and taking the horse of plaintiff with him. A day or so later defendant, without plaintiff's knowledge, returned the horse of plaintiff he had received and took his own from plaintiff's stable. *Held*, that as the original contract was an unlawful one, the court would render no aid to either, and as plaintiff's possession was *prima facie* evidence of ownership, he might, on the strength of that possession, and the trespass of defendant, maintain replevin for the horse so taken away by defendant. The court said: "If the defendant in this action had brought replevin for the horse, instead of taking him by force, he would have been defeated, because he would have been obliged to introduce evidence to overcome the presumption arising from plaintiff's possession. By the acts of the parties in violation of law the plaintiff became entitled to the possession of the horse. This possession was such that the defendant could not have recovered by action the price, if sold and not paid for, and could not maintain an action of replevin. He, however, wrongfully and by a trespass, deprived the plaintiff of the possession. The question is, will he be allowed to recover by force what the law would not have aided him to recover peaceably? It is insisted by counsel for appellant, that because the plaintiff claims title to the horse, he was bound to introduce evidence of such title, and could only do so by showing the Sunday contract. But according to the certificate of the trial judge, the plaintiff was in possession, and the defendant, by force, and without the knowledge of the plaintiff, removed the horse from plaintiff's stable. The question is, by what right did the defendant possess himself of the horse? The burden was on him to show his right. In doing so he would necessarily be compelled to introduce the Sunday contract in evidence. In *Smith* v. *Bean*, 15 N. H. 577, referring to a contract of sale made on Sunday, it is said: 'The transaction being illegal, the law leaves the parties to suffer the consequence of their illegal acts. The contract is void so far as it is attempted to be made the foundation of legal proceedings. The law will not interfere to assist the vendor to recover the price. The contract is void for any such purpose. It will not sustain an action by the vendee upon any warranty or fraud in the sale. It is void in that respect. The principle shows that the law will not aid the vendor to recover possession of the property if he has parted with it. The vendee has the possession as of his own property by the assent of the vendor, and the law leaves the parties where it finds them. If the vendor should attempt to retake the property, without process, the law, finding that the vendee had a possession which could not be controverted, would give a remedy for the violation of that possession.' See, also, 2 Pars. on Cont. 764, and notes. The author admits there is some conflict of authority upon the question whether a vendee will be allowed to retain the property without paying the price. In our opinion he should, upon the ground that the law will leave the parties where it finds them. It was held in *Pike* v. *King*, *supra*, that the plaintiff could not recover the value of the property aside from the price agreed upon, or, in other words, could not recover upon the *quantum valebat*." So, to punish two for horse-trading on the Lord's Day, the law gave one of them both the horses.—*Albany Law Journal.*

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

JULY 8.

From Q. B.]

TRUST AND LOAN COMPANY v. LAWRASON.

Statutory Mortgage—Attornment—Tenancy at will—Distress.

The distress clause in the form given by the Act respecting short forms of mortgages is merely a license to take the goods of the mortgagor. The proper construction of the clause

is that it prescribes in a concise referential manner for the disposal of the goods when seized, in the same manner as goods seized for rent.

A mortgage pursuant to this Act, embracing all its clauses, contained, as an addition to the release clause, the following:—"And the mortgagor doth attorn to and become tenant at will to the mortgagees, subject to the said proviso." The "said proviso" was the defeasance clause.

Held [OSLER, J., dissenting], that though the relation of landlord and tenant may have been thereby created, yet there having been no rent fixed, the power to distrain did not arise, and the plaintiffs could not claim a landlord's right as against an execution, creditor to payment of a year's arrears of interest on their mortgage, before removal by the Sheriff.

The relation of landlord and tenant may, notwithstanding, be created by proper words between mortgagee and mortgagor, for the *bona fide* purpose of further securing the debt, without being either a fraud upon creditors or an evasion of the Chattel Mortgage Act.

J. K. Kerr, Q. C., and *Wilkes*, for appellant.
Robinson, Q. C., and *Marsh*, for respondents.

From Q. B.]

GRAND JUNCTION RAILWAY CO. v. THE COUNTY OF PETERBOROUGH.

Provincial Railway—Federal Legislation—Constitutionality of—Municipal By-Law—Validity of.

The Grand Junction Railway Company, intended to be wholly within Upper Canada, now Ontario, was amalgamated with the Grand Trunk Railway of Canada, the latter being a Dominion Railway. The former railway not having been built within the time directed, its charter expired. In May, 1870, an Act was passed by the Dominion Parliament to revive the charter of the Grand Junction Railroad Co., but gave it a slightly different name and made some changes in the charter. On the 23rd November in the same year the ratepayers of the defendant municipalities voted on a by-law to grant a bonus to the plaintiff company—construction of the road to be commenced before the 1st May, 1872. The by-law was read twice only. At the time when the voting took place on the by-law there was no power in the municipality to grant a bonus. On the 15th February, 1871, the Act, 34 Vict. cap. 48 (O) was passed, which declared the by-law as valid as if it had been read a third time, and that it should be legal and binding on all persons as if it had been passed after the Act. On the same day cap. 30 of the same year was passed, giving power to municipalities to aid railways by granting bonuses. The 37 Vict. cap. 43 (O) was then passed, amending and consolidating the Acts relating to the plaintiff railway, but did not relate to the by-law; and the 30 Vict. cap. 71 (O) extended the time for completion, but did not validate the by-law.

Held, reversing the decision of the Court below, that as the original charter had expired by effluxion of time, and a new corporation must be created, and not the old one revived, and as the railway was a local work of the Province of Ontario, the Dominion Act was unconstitutional and of no validity. There was therefore no railway company in existence to receive the bonus under the by-law, either at the time of voting thereon, or at the time of its legalizing by the 34 Vict. cap. 48 (O). The 37 Vict. cap. 43 (O) was the first Act by a legislative body, having the requisite power, which incorporated the plaintiff; but no provision having been made, either by that Act or the 39 Vict. cap. 71 (O), for legalizing the by-law in favour of the plaintiffs, they could not recover the bonus from the defendants.

Robinson, Q.C., and *H. Cameron*, Q.C., for the appellants.

Bethune, Q.C., and *Edwards*, for the respondents.

From C. P.]

STAFFORD v. BELL.

Provincial Land Surveyor—Negligence—Liability for.

A Provincial Land Surveyor is only bound to bring to the practice of his profession a reasonable amount of skill and knowledge, and is liable only for damage caused by the want of these or by gross negligence.

In order to charge a Surveyor for proceeding upon an erroneous principle in making a survey, it must be shown that the survey is erroneous,

and that the plaintiff has, in consequence, suffered damage.

Robinson, Q. C., for appellant.

Read, Q. C., and *W. Read*, for respondent.

From C. P.]

REGINA v. BROWNE.

Extradition—Depositions—Foreign indictment—33, 34 Vict., cap. 52, and 36, 37 Vict., cap. 60 (Imp.)—31 Vict., cap. 94 (D).

The defendant was accused by the State of New York of complicity in a crime committed in that State, and was under indictment in the foreign court. Upon the application for extradition, the coroner who had held the inquest in the foreign State himself appeared, and proved his authority to do so, and by oral testimony proved the original depositions taken upon the inquest, which he then produced. A warrant was issued for the defendant's arrest by the district attorney of the foreign State upon the finding of the grand jury of a true bill for murder, but upon what evidence it proceeded was not shown.

Held, that the Canadian Act, which enacts that, upon the return of the warrant of arrest, *copies* of the depositions upon which the original warrant was granted in the United States, certified, &c., and attested upon the oath of the party producing them to be true copies, may be received in evidence, does not interfere with the enactments of the Imperial Statute as to original depositions, and that the original depositions in this case were therefore properly admitted.

An accessory before the fact is extraditable, but an accessory after the fact is not. But there was sufficient evidence here to warrant and require extradition.

Held, that the foreign indictment was not admissible as part of the evidence.

Ogden, for the appeal.

J. K. Kerr, Q. C., contra.

From C. P.]

MORTON v. THE CITY OF ST. THOMAS.

Highways—Dedication—Registered plan.

Apart from the Registry Act, if a person sells lots according to a plan, the purchaser acquires an interest in the streets shown upon the plan adjoining the lots which places them beyond his future control to their injury.

Registration of such a plan does not constitute a dedication of the streets or lanes thereon to the public, and a by-law passed for the opening of such a lane as a public highway, without compensation to the owner, was properly quashed.

Cattanach, for the appellants.

Hodgins, Q. C., for the respondent.

From Blake, V. C.]

LAWLOR v. LAWLOR.

Estate tail—Mortgage of, in fee simple—Statutory discharge—Effect of.

A mortgage in fee simple of an estate tail has by statute a tortious operation, conveying to the mortgagee a greater estate than the tenant in tail has.

A registered discharge, under section 67 of the Registry Act, of such a mortgage, which has become absolute by non-payment on the day named, does not vest the estate in the mortgagor barred of the entail, but its effect is to resettle upon the mortgagor his original estate, upon the uses declared by the original settlement.

Plumb, for appellants.

Tupper, for respondent.

From Blake, V. C.]

MCDONALD v. DAVIDSON.

Allowance to Trustee—Discretion of Judge.

What is a proper compensation to be allowed to a trustee for his management of the trust estate is matter of opinion, upon hearing and considering what he has done; and even if it appear that in granting the allowance the Court below may have erred on the side of liberality, that is not sufficient ground for reversing the judgment.

Remarks upon the bringing of an appeal where the amount in question is trivial.

Rose, for appellants.

W. Cassels and *K. McLean*, for respondent.

From Spragge, C.]

HUGHES v. HUGHES.

Executor de son tort—Administration—Personal representative—Administration of Justice Act, sec. 9.

An executor *de son tort* is treated as an executor for the purpose of being charged only, and his presence before the Court will not dispense with that of a regular representative where the estate of an intestate is to be administered.

Where the estate of a deceased person itself forms the subject of a suit, such person is not a party interested in the matters in question in the suit within the meaning of section 9 of the Administration of Justice Act, R. S. O., cap. 49. This section is confined to cases in which the deceased person was in his life-time interested in the matters in question in the suit.

Donovan, for appellants.

E. Blake, Q. C., and *Geo. Morphy*, for respondents.

From Proudfoot, V. C.]

MCLAREN v. CALDWELL.

All streams, public highways — Floating timber on—Private Improvements—Private rights—C. S. U. C., cap. 48, sec. 15—Costs —Stay of execution under Appeal Act.

The plaintiff, a lumberman, was the owner in fee simple of several parcels of land and large tracts of timber. A stream, in parts of the bed of which he had the fee simple, ran through his lands, which, in its natural state, had not the capacity for floating timber at any time of the year. The plaintiff, and those through whom he claimed, spent large sums of money in making improvements upon the stream and in deepening it, and thereby made it available. The defendant, who owned timber limits in the neighbourhood, claimed the right to float his timber down the stream.

Held, reversing the decision of PROUDFOOT, V. C. (BURTON, J. A., dissenting), that the stream was a public waterway by virtue of C. S. U. C. cap. 48, sec. 15, which, by its terms, applied to all streams, whether of natural capacity to permit timber to be floated down them or not; and that the defendant had the right to float timber down the same during the spring, summer and autumn freshets, without compensation to the plaintiff. The appeal was allowed without costs, as the improvements had been made and the bill filed relying on the authority of decided cases.

Boale v. *Dickson*, 13 C. P. 337, overruled.

Per BURTON, J. A. By the Common Law those streams only which are sufficiently large to be navigable are highways by water, while small streams, being unnavigable and not susceptible of use as a common passage for the public, are not subject to the servitude of the public interest. The statute is declaratory only of the Common Law right of every one to use a stream capable, in its natural state, of transporting timber, etc., and declared also that it was not essential to the public easement that its capacity should be continuous. The Act was not intended to confer any new right.

Sec. 27 of the Court of Appeal Act does not apply to cases of injunction, the decree for an injunction being, so to speak, executed as soon as made.

Bethune, Q. C., and *Moss*, for appellant.

McCarthy, Q.C., and *Creelman* for respondent.

From C. C. York.]

CLARK v. BARRON.

Rule absolute on ground not taken therein.

A verdict was set aside and a non-suit entered, upon a ground not taken as a defence at the trial, or in the rule *nisi* to set aside the verdict.

Held, that it was erroneous for the learned Judge in the Court below to have so given effect to the defence. It appearing upon the whole evidence that the plaintiff was entitled to succeed upon the merits, the appeal was allowed, and the rule to set aside the plaintiff's verdict was discharged.

E. Douglas Armour, for appellants.

Falconbridge, for respondent.

From C. C. Bruce.]

HUNTER v. VANSTONE.

New trial—Discretion of Judge—Appeal from.

An application for a new trial is an application to the discretion of the Court; and where

the Judge of first instance grants a new trial on account of dissatisfaction with the verdict rendered, his discretion will not be interfered with unless it appears that he is clearly wrong.

H. J. Scott, for appellant.
Creelman, for respondent.

QUEEN'S BENCH.

IN BANCO—JUNE 25.

SMITH v. BAMFORD.

Ejectment—Statute of Limitations.

The occupant of land having submitted to an entry and agreed to remain tenant to the owner, *Held*, that a new tenancy at will was created and stopped the operation of the Statute of Limitations.

S. Smith, Q. C., for plaintiff.
J. W. Kerr, for defendant.

REG. EX REL. CLANCY v. MCINTOSH.

Municipal act—Acceptance of office.

In order properly to accept office under R. S. O., ch. 174, s. 180, a mayor elect must do so formally by declaration of qualification of office, and not merely verbally by speech to the electors.

Defendant, not being assessed for 1880, was in September of that year assessed for 1881 upon unencumbered leasehold premises valued at $4,100. The assessment was, under by-law, revised before 15th November, and on 31st December returned as the assessment roll for 1881, and was unappealed.

Nomination Day was 27th December, 1880. and defendant elected mayor 3rd January following.

Held, that the election began on Nomination Day, and the assessment roll was not the last revised roll then, under R. S. O., ch. 180, s. 44, and defendant was thereupon disqualified.

Ogden, for relator.
Aylesworth, contra.

DREW v. CORPORATION OF EAST WHITBY.

Negligence—Injury to fellow-servant.

Plaintiff was employed by defendants in mending a bridge, and was hurt by a portion of the machinery used in the work, which was set in motion under the order of the Reeve of the municipality, who was employed by one of the councillors, the foreman. *Held*, that defendants were not liable, as the Reeve was not present in his official capacity, but merely as a hired fellow-servant.

Bethune, Q. C., for plaintiff.
Ritchie, contra.

LAING v. ONTARIO LOAN AND SAVINGS COMPANY.

Growing crops—Mortgage—Distress clause in mortgage of land.

Under the statutory distress clause in the Short Forms of Mortgage Act, the mortgagee cannot take a stranger's goods on the premises.

Crops in the land are the mortgagor's as emblements, where the mortgagor is tenant at will to mortgagee.

Where the seed has been sown the property in the crops will pass under a chattel mortgage of the latter.

Bethune, Q. C., for plaintiff.
Ritchie, contra.

GRIFFIN v. MCKENZIE.

Chattel mortgage—Renewal.

G. made a chattel mortgage to plaintiff on 9th May, 1879, which was filed 13th May following. G. made another mortgage to defendant in the month of December following. Plaintiff re-filed mortgage, having on 12th April, 1880, sworn to amount due to 10th of same month. In trover for goods distrained by defendants as landlords of mortgagor, and comprised in plaintiff's mortgage, *held*, that the informality in the re-filing of plaintiff's mortgage could not be objected to by defendants by reason of the statement of the amount due not being made within the thirty days before the expiring of the year.

Fitch, for plaintiff.
Hodgins, Q. C., contra.

HAMILTON v. HARRISON.

Chattel Mortgage—Affidavit—Consideration—Growing crops.

The affidavit of the mortgagee in a chattel mortgage appeared to be sworn before "J. B. F." without the words, "a commissioner," &c. The affidavit of execution contained these words. *Held*, that the former affidavit was good.

It appeared in evidence that the amount actually due was less than that stated in the mortgage, and the judge at trial having nonsuited the plaintiff,

Held [ARMOUR, J., dissenting], that the nonsuit was wrong, as the consideration was not one of law, but for the jury, whether there was fraud or not.

The mortgage covered growing crops.

Held [ARMOUR, J., dissenting], that such a subject was not within the Act, being incapable of delivery or change of possession.

G. A. McKenzie, for plaintiff.

McGillivray, contra.

BAILLIE v. DICKSON.

Promissory note—Note of dishonour.

A notary at Montreal protested a note upon which the defendant, an attorney at Belleville, was endorser. The notary, not being able to read the defendant's signature, made an imitation of it upon the notices and in the address of the letter which was addressed to "Belleville P.O.," in the Province of Ontario. The defendant constantly received letters from the Belleville Post Office. There was proved to be a Belleville in New Brunswick. Other notes, with his endorsement thereon, had been protested by the same notary. The defendant swore that he had never received the notice; but his clerks, who were accustomed to take his morning letters from the Post Office, were not called. The notice to another endorser, addressed to "Belleville P.O.," was received by him.

Held, [CAMERON J., dissenting] that if the imitation of the defendant's signature put upon the notice addressed to Belleville was an exact imitation of defendant's signature upon the note, and such notice was posted at Montreal, it would have been sufficient, whether it reached its destination or not.

New trial granted, [ARMOUR J., dissenting.]

Bethune, Q.C., for plaintiff.

Ferguson, Q.C., for defendant.

VACATION COURT.

Wilson, C. J.] [June 4.

IN RE GALLERNO AND THE TOWNSHIP OF ROCHESTER.

By-law—Publication of—Adjoining municipality.

A proposed by-law of the Township of Rochester was published in a newspaper in the Town of Windsor, which is, for all practical purposes, other than judicial and municipal business, the County Town of Essex, in which the Township of Rochester lies. There was no newspaper published either in Rochester or in Sandwich, the County Town, or in the *next* adjoining municipality; but there were several published in several small villages, which were nearer the Township of Rochester than was the Town of Windsor, but the circulation of these papers was much smaller in Rochester than was that of the Windsor paper.

Held, that the publication was sufficient; since, if the meaning of the words "adjoining local Municipality," as used in 42 Vict., cap. 31, sec. 21, were restricted to "*next* adjoining," etc., it would be impossible to publish the by-law; and it did not form sufficient ground of objection that there were other papers published a few miles nearer to Rochester than Windsor.

H. J. Scott, for the Rule.

Aylesworth, contra.

CHANCERY.

Ferguson, V. C.] [June 7.

IN RE SAYERS; SAYERS V. KIRKPATRICK.

Administration—Additional commission.

Upon an application under G. O. 643 for an order awarding an additional sum for costs, in the distribution of the estate, The Court, in view of the unusual amount of work done and the responsibility borne by the solicitors in the matter, the amount the estate realized having exceeded $44,000, it was referred to the Master to tax to all parties their disbursements, and to fix a proper sum to be paid for their services performed since the making of the original report, the same to be paid out of the moneys belonging to the estate.

H. Cassels, for plaintiff.

J. Hoskin, Q. C., for defendants.

Ferguson, V.C.] [June 7.

MCLAREN V. CALDWELL.

Injunction—Appeal—Stay of proceedings.

In an injunction suit to restrain the use of an improved stream, claimed by the plaintiff, the defendant appealed from a decree restraining the use thereof, and while the case was under consideration in the Court of Appeal, the plaintiff issued his injunction and served it. The defendant thereupon moved to stay proceedings, on the ground that execution was stayed under section 27 of the Court of Appeal Act upon security being perfected.

The Court refused the application on the ground that this section does not apply to injunctions, whether issued before or after decree.

Bethune, Q. C., and *Moss*, for the motion.

McCarthy, Q. C. (with him *Creelman*), contra.

Spragge, C. J. O., as Chan.] [June 11.

PARKS V. MOFFATT.

Conveyance to uses—Construction of—Estate tail—Lease of tenant in tail—Rack-rent.

A conveyance was made to B. & B., "in trust to hold the same for the use of M. A. L., wife of F. L., and the said F. L., for their joint lives, and upon, from, etc., in trust for the use of, etc.," so as to create an estate tail.

Held, that notwithstanding the use of the word "trust," B. & B. were grantees to uses only, and that M. A. L. and F. L. took a legal estate in fee tail.

Grantees to uses had made a lease for nineteen years, in which the *cestuis que use* had joined for the purpose of consenting thereto. The Court being of opinion that the supposed trustees were grantees to uses only,

Held, that such lease was inoperative, as the *cestuis que use* had not created any estate, but had consented only to the act of the grantees to uses.

The lease so intended to be created had not been registered within six months after execution, and the rent reserved was not a rack-rent, or five sixths of a rack-rent.

Held, invalid under the Act relating to assurances of estates tail.

The *cestuis que use* made an assignment of the right to receive the rents and royalties payable under such lease, and used words of conveyance of their estate. But,

Held, that such assignment could not operate to validate the lease.

Moss and *Lister*, for plaintiff.

McArthur and *Moncrieff*, for defendants.

Boyd C.] [June 15.

KILLINS V. KILLINS.

Further directions—Defendant setting down—Right to begin.

The setting down of a cause by the defendant, under the G. O. upon the plaintiff's default so to do, does not take away from the plaintiff his right to begin.

W. Cassels, for plaintiff.

Moss, for defendant.

Boyd C.] [June 25

STAMMERS V. O'DONOHOE.

Vendor and purchaser—Vendor's duty as to incumbrances—G. O. 226—Practice.

A vendor agreed to pay off a mortgage existing on the property, and the decree directed a good and sufficient conveyance "according to said

agreement." The Court directed that the vendor pay off the mortgage within a limited time, or in default that the purchaser should be at liberty to do so, procure an assignment and have his remedy against the vendor, whose conveyance he was not bound to accept till this mortgage was paid off; the purchase money in Court to be applied *pro tanto* thereto.

Held, also, that as the matter had been referred to the Master by the decree which was for specific performance, it should have been disposed of in his office under G. O. 226.

Foster, for plaintiff.
H. P. Sheppard, for defendant.

Boyd C.] June 25.

FOSTER v. MORDEN.

Mortgage—Account.

The plaintiff, carrying on the business of a druggist, mortgaged his stock-in-trade to the defendant, the instrument by which it was effected stipulating that the defendant should take possession of the stock and premises, to hold for four months in order to secure repayment of money advanced, and power was given to the mortgagee to add new stock so as to keep up the business. Default was made in payment, and thereafter a large amount of stock was added, some of the money being expended by the defendant with the assent of the plaintiff, other money being part of the profits of the business which were thus re-invested in new stock; some of the old stock remaining in specie. The matter was referred to the Master at Belleville to take the accounts of the dealings between the parties. Before the Master made his report the plaintiff applied on petition for the appointment of a Receiver, on the ground that the mortgagee had been paid in full.

Held (1), that as the new stock belonged to the mortgagee himself, and the plaintiff could therefore have no claim upon it, and as the Master had not yet found which party was indebted to the other, his finding would not be anticipated by the appointment of a Receiver. (2.) That although the defendant's right on default was to sell the original stock *en bloc* after notice, still the defendant was at liberty to add further capital and stock to the business, but not to the prejudice of the mortgagor so as to improve him out of his estate; and so long as the plaintiff chose to allow the business to go on under the defendant's control he had the right so to conduct it, subject to being called on to account.

Arnoldi, for plaintiff.
A. Hoskin, Q.C., for defendant.

Ferguson, V. C.] [June 30.

THOMSON v. VICTORIA MUTUAL FIRE INSURANCE COMPANY.

Pleading—Demurrer—Party suing on behalf of a class.

Where a right of suit exists in a body of persons too numerous to be all made parties, the Court will permit one or more of them to sue on behalf of all, subject to the restriction that the relief prayed is one in which the parties whom the plaintiff professes to represent have all of them an interest identical with that of the plaintiff. Therefore, where a mutual insurance company had established three distinct branches, in one of which, the water-works branch, the plaintiff insured, giving his promissory note or undertaking to pay $168, and the company made an assessment on all notes and threatened suit in the Division Court for payment of such assessment; whereupon the plaintiff filed a bill "on behalf of himself and the other policy holders associated with him as hereinafter mentioned," alleging the company was about to sue him and the other policy holders in said branch, that large losses had occurred in the company prior to the time of his effecting his insurance, and insisting that he could be properly assessed only in respect of such as had arisen since he entered the company, and praying that the necessary inquiries might be made and accounts taken, alleging that the Division Courts had not the machinery necessary for that purpose,

Held, that according to the statements of the bill, the policy-holders in the water-works branch were not represented in the suit, and a demurrer on that ground filed by the company was allowed with costs.

W. Cassels and *J. R. Roaf*, for plaintiff.
Moss, for defendant.

Ferguson, V. C.] [June 30.

PEARCE v. CANAVAN.

Mortgagor and Mortgagee—Costs.

A mortgagee of lands with a power of sale gave notice of his intention to exercise the power, whereupon the assignee of the equity of redemption in a portion of the premises, in consequence of information received from the mortgagor, filed a bill to redeem, alleging that the mortgage debt had been paid, or that only a small sum remained due. In that suit the Master found that the whole mortgage remained unpaid, and his finding was affirmed by the Court on appeal. In a subsequent proceeding to enforce his claim against the land the plaintiff in that suit was held entitled to his costs, his action being in reality a defence of his claim as mortgagee.

W. Roaf, for plaintiff.

J. H. Ferguson and *Hodgins*, Q.C., for defendant.

Ferguson, V. C.] [June 30.

HOLWAY v. HOLWAY.

Alimony.

On an application to reduce the amount of alimony payable by the defendant to the plaintiff the property of the defendant was variously estimated, (lands and personalty) at from $2,938 to $6,000) and the evidence of the defendant when cross-examined upon his affidavit filed by him in support of the motion being unsatisfactory, the Court, [FERGUSON, V.C.] refused to interfere with the report of the Master fixing the amount, and which had been paid under such report for about eighteen months without objection; but the result of the application was not to be considered conclusive against him on any other motion the defendant should be advised to make.

Moss, for plaintiff.

Doherty, for defendant.

Ferguson, V. C.] [June 30.

PLATT v. BLIZARD.

Specific performance—Misrepresentation—Costs.

In a suit for specific performance, the defendant set up that the reason he had refused to complete the agreement was that he had been induced to enter into it by certain misrepresentations of the plaintiff, but which he entirely failed in proving. The Master, having reported that a good title was shown in his office the decree on further directions ordered the costs to be paid by the defendant, notwithstanding that the bill contained certain statements which it was alleged were not true, and had not been proved, the Court being of opinion that such statements had not any material bearing upon the case.

Moss, for plaintiff.

W. Cassels, for defendant.

CHANCERY CHAMBERS.

Ferguson, V.C.] [June 16.

MACDONALD v. WORTHINGTON.

Appeal from decree—Money in Court—Interest on—Security for.

A decree was made which, among other things, directed the payment out to the defendant J. W. of a large sum of money, paid into Court pending the suit. The plaintiff appealed from the decree and, under an order allowing him to do so, paid into Court $400 as security for the cost of the appeal.

Subsequently an order was made that, upon the plaintiff's furnishing security to the amount of two hundred dollars for the difference between Court interest and the legal rate, the proceedings be stayed so far as the order for payment out of the money in Court was concerned. From this order the plaintiff appealed.

Held, affirming the decision of the Referee, that he had power on making the order to impose such a condition; and that, inasmuch as the money remained in Court for the plaintiff's own protection, it was not unreasonable that such security should be given.

A. M. Macdonald, for plaintiff.

H. Cassels, for defendant.

Proudfoot, V. C.] [June 30.

STINSON v. STINSON.

Allowance to trustees—Appeal—Costs.

In a proper case, where the interests are important and the estate large, the Master may allow a sum in gross to the trustee, instead of giving a percentage.

The Master at Hamilton allowed a trustee a gross sum of $15,400. The trustee, who was also personally interested, did not, however, in his evidence, refer particularly to the several properties dealt with, the items of care, management, &c., during the period for which the allowance had been made. Under these circumstances the matter was referred back to the Master, with liberty to the trustee to give further evidence.

Trustee to pay costs.

LAW STUDENTS' DEPARTMENT.

EXAMINATION DAYS.

A change has been made in some of the days appointed for examinations. The following is a corrected statement:—

Primary—August 9, 10, 11.
First Intermediate—August 30, 31.
Second Intermediate—August 24, 25.
For admission as Attorney—August 17.
For Call—August 18.
For Call with honours—August 19.

EXAMINATION QUESTIONS AND ANSWERS.

The following questions and answers are taken from the English *Bar Examination Journal*. The answers will serve to give an idea to students as to the mode in which answers may be framed and the extent to which they should go. If found of use we shall publish more of them. We should be glad of information on this point.

Q.—1. How far do alterations of, or additions to a deed after its execution by the grantor effect its validity?

A.—An immaterial alteration will not affect the validity of a deed, nor will a material alteration made by a stranger. But a material alteration made by a party to the deed will render it void to this extent, that he will be unable to bring any action upon it. But an action can still be brought against him upon it, and the alteration of the deed will not reconvey an estate which passed on its delivery. (Wms. R. P. pt. I. c. 7; Smith R. & P. 3rd ed. 859.)

Q.—2. What differences exist in form and use between a deed poll and an indenture? Is ndenting essential to an indenture, and can an immediate estate in lands be taken under an indenture by a person not named as a party to the deed?

A.—A deed by one party only is called a deed poll. A deed made between two or more parties is called an indenture. A deed poll commences with the words "Know all men by these presents," when there are no recitals in it; but, when there are recitals, it commences "To all to whom these presents shall come, A. B., of X., sends greeting." An indenture always begins "This indenture made the—th day of ——, (date), between, &c." It is not necessary that an indenture should be actually indented. There was formerly a rule that a person not na med as a party to an indenture could not take an immediate estate in lands under it; but this is now altered by the Stat. 8 & 9 Vict. c. 106, s. 5, that an immediate estate may be taken under an indenture by a person not named a party to it. (Wms. R. P. pt. I. c. 7.)

Q.—3. In a conveyance on sale of freehold land the ordinary form of the habendum is, "To hold the said premises unto the purchaser and his heirs, to the use of the purchaser his heirs and assigns, for ever." Which of those words are, and which of them are not essential, and why?

A.—It is not necessary to declare a use in a conveyance on a sale, as the consideration rebuts any presumption of a resulting use. It is also unnecessary to use the word assigns. It is sufficient to limit the land to the purchaser and his heirs.

Law Society of Upper Canada.

OSGOODE HALL.

EASTER TERM, 44TH VICT.

During this Term the following gentlemen were called to the degree of Barrister-at-Law :—

George Bell, with honors; John O'Meara, Charles Henry Connor, George Macdonald, John Birnie, jr., Charles Egerton Macdonald, Howard Jennings Duncan, Stewart Campbell Johnstone, Lendrum McMeans, William Boston Towers, Francis Edward Galbraith, Charles Wright, John Kelley Dowsly, Chas. Herbert Allen, Charles Elwin Seymour Radcliffe, James Leland Darling, John Clark Eccles, George William Baker, Hedley Vicars Knight, George Ritchie.

(The names are placed in the order of merit).

And the following gentlemen were admitted into the Society as Students-at-Law, namely :—

GRADUATES.

Adam Carruthers, B.A., James Alexander Hutchinson, B.A., George Frederick Lawson.

MATRICULANTS OF UNIVERSITIES.

John L. Peters, Morris Johnson Fletcher, Francis Cockburn Powell, Toronto University.

JUNIOR CLASS.

Herbert Gordon Macbeth, Alson Alexander Fisher, William Edward Sheridan Knowles, Thomas Hobson, obert Alexander Dickson, Peter D. Cunningham, Alexander McLean, William Thomas McMullen Miron Ardon Everetts, William John McWhinney, Richard Armstrong, Alexander Duncan McLaren, Edward Corrigan Emery, John Craine, Joseph McKenzie Rogers, W. Arthur Ernest Kennedy, Geo. Herbert Stephenson, Arthur W. Wilkin, Walter George Fisher.

And the examination of William Lesslie Beale was ed wedallohim as canArtil Clerk.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

1881.
- Ovid, Fasti, B. I., vv. 1-300; or,
- Virgil, Æneid, B. II., vv. 1-317.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History—Queen Anne to George III.
- Modern Geography—N. America and Europe.
- Elements of Book-keeping.

In 1882, 1883, 1884 and 1885. Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

Students-at-Law.

CLASSICS.

1881.
- Xenophon, nabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero in Catilinam, II., III., IV.
- Ovid, Fasti, B. I., vv. 1-300.
- Virgil, Æneid, B. I., vv. 1-304.

1882.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum, (B. G. B. IV. c. 20-36, B. V., c. 8-23.)
- Cicero, Pro Archia.
- Virgil, Æneid, B. II., vv. 1-317.
- Ovid, Heroides, Epistles V. XIII.

1883.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum.
- Cicero, Pro Archia.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Heroides, Epistles V. XIII.

1884.
- Cicero, Cato Major.
- Virgil, Æneid, B. V., vv. 1-361
- Ovid, Fasti, B. I., vv. 1-300.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.

1885.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid, Bb. I., II., III.

Canada Law Journal.

VOL. XVII. AUG. 22, 1881. NO. 15.

DIARY FOR AUGUST.

1. Mon..Battle of the Nile, 1798.
2. Tue..2nd Intermediate Examination.
3. Wed..2nd Intermediate Examination.
4. Thurs1st Intermediate Examination.
5. Fri...1st Intermediate Examination.
6. Sat...Price Alfred born, 1844.
7. Sun..,*8th Sunday after Trinity.*
10. Wed..Primary Examination.
11. ThursPrimary Examination.
12. Fri...Primary Examination.
13. Sat..Sir Peregrine Maitland, Lt. Gov. U. C., 1818.
14. Sun...*9th Sunday after Trinity.*
18. Thurs..Gen. Hunter, Lieut.-Gov. U. C. 1799. Final Examination.
20. Sat..Final Examination. Long vacation Q.B., C. P. Chan and Co. Court ends.
21. Sun..*10th Sunday after Trinity.*
27. Mon..Trinity Term begins.
26. Fri...Re-hearing Term in Chancery begins. Francis Gore, Lieut.-Gov. U. C., 1806.
28. Sun..*11th Sunday after Trinity.*
31. Wed..Long Vacation in Supreme Ct., Exch. Ct. and Ct. of Appeal ends.

TORONTO AUG. 22, 1881.

IN another place will be found an interesting obituary notice of the late Lord Hatherley.

THE long vacation is at an end, and the day which summons our readers to resume their toils, acquires on this occasion a significance peculiarly its own, for reasons which it is scarcely necessary to specify. Suffice it to say, that at this opening of a new legal epoch, "from and after which" the Ontario Courts are to be "united and consolidated together," the LAW JOURNAL, while not so churlish as to refuse the tribute of a respectful sigh to the memory of the deceased Courts of Queen's Bench, Chancery, and Common Pleas, offers its congratulations to their new-born successors, and trusts that the various "Divisions" may belie their name by producing harmonious "fusion," in which the lamb of Equity shall lie down in peace beside the lion of Common Law.

WE do not know whether the large number of candidates at the primary and final examinations, held during the present month, is to be attributed to the pleasing nature of the prospect held out in the preceding paragraph, or to the hope that the heat of the dog-days will have a tendency to melt the hearts of the examiners. It is the fact, at all events, that thirty-two candidates presented themselves at the recent examination for Certificate of Fitness, which is, we believe, a larger number than on any previous occasion. The number of candidates at the other examinations was also far above the average, especially as regards matriculants from universities.

A TARIFF of fees has been made by the Judges of the Supreme Court for Ontario, for the High Court of Justice, under the Judicature Act. It comes into force this day, 22nd August. The fees allowed are almost identical with those now allowed for similar services; and additional items have been added for new services under the Judicature Act. The Judges do not appear to have increased the existing tariff; but, we apprehend the result of the Act will be as in England, a large increase in bills of costs.

EDITORIAL NOTES.

THE *cause celebre* of *Angus* v. *Dalton* has finally been decided by the House of Lords in the plaintiff's favour. It was, as our readers will remember, an action to recover damages for the fall of a house caused by excavations made by a neighbouring owner. A verdict was given for the plaintiff at the trial, under the direction of Mr. Justice Lush, but the Queen's Bench on motion directed a verdict for the defendant. This decision being reversed by the Court of Appeal, the defendant went to the House of Lords, where the appeal was dismissed with costs.

AN esteemed cotemporary concludes its remarks upon a recent statute in these words:—"Though the Legislature and the Law Society may by their combined efforts make a man a barrister, nature alone can make him a lawyer." The temptation to construct an epigrammatic sentence has, we fear, led its author a little astray. We know on good authority that "the poet is born, not made," but we strongly question the applicability of the Ciceronian maxim to the lawyer, who must seek for distinction by the arduous path of unremitting toil, and will soon find himself distanced in the race for fame and fortune, if he draws his law from the fountains of "nature alone."

ATTORNEYS and solicitors, and especially those in country places, have occasionally complained, and not without reason, that their position is often unfortunate, in that whilst they have to get money as best they can from clients, and have to wait for it, and sometimes lose it, counsel whom they employ expect their fees to be paid in cash, or at a short date. These expectations, however, are not always realized. The boot is sometimes on the other leg, and we happen to know of cases where money intended for counsel has never got beyond the pocket of the lawyer who engaged him. The proper mode of treatment in such cases has recently been prescribed by the Queen's Bench Division in England. A solicitor there received £27 to pay counsel who had conducted proceedings for his client. He did not pay the money. The matter was eventually brought to the notice of the Incorporated Law Society, who, after writing the delinquent without result [Benchers will kindly note this fact], applied to have him struck off the rolls. The money was then paid, and a lame excuse made to the Court. But Lord Coleridge said that the solicitor's conduct was fraudulent, and he felt (as he had often said) that, as solicitors were invested with a position and claim to confidence as officers of the Court, the Court was bound to exercise a control over their conduct. The solicitor must be suspended for six months, and pay all the costs. Baron Pollock concurred.

AN industrious correspondent has flooded us with the cards and newspaper advertisements of a barrister, who resides less than a hundred miles from the county town of Northumberland, and asks us to notice his unprofessional mode of bringing the many advantages enjoyed by those who employ him to the notice of the public. As this journal does not circulate amongst those who would be benefited by his services, it seems useless for us to re-state his announcement that he "will continue his law, loan, and insurance practice with good assistants." It strikes one as strange, however, that such a "smart" man (as our Yankee friends would call him) can require any assistance. But this may be accounted for, perhaps, by the following: "He thanks his friends for their confidence and good-will during his recent illness." No wonder he was ill with all these different "lines" to attend to. Whilst we

feel that we have a right to "chaff" one, who, for all we know, may have erred through ignorance, there can be no doubt that this objectionable style of advertising, on the part of a professional man, may have to a great extent been induced by the fact that irresponsible invaders have largely "cut into" the legitimate business of lawyers, and especially so in country places. We need scarcely refer to this matter further, but we have a fresh instance of this sort of thing in an elaborate card now before us, of one who thus advertises his wares, "Dry Goods, Groceries, Commissioner and Conveyancer, Real Estate Agent, Boots and shoes." An additional letter on this much-debated subject appears in another place. Some think that the remedy therein proposed would be rather worse than the disease. The matter, however, is before the Benchers for consideration, and we think they are alive to its importance.

SCIENTIFIC LEGISLATION.

In these days of much legislation it is strange that some legislator, learned in the law, has not taken up various departments or branches of our law and sought to treat them on some scientific principle. It is hard for the legal mind to grasp, it is impossible for the lay mind to comprehend, differences and distinctions which to be explained must be traced back to the dark ages.

Mr. Meredith did good work for the profession when he prepared the Wills Act—one of the best pieces of legislation we have on our Statute book. We care not where he got the material which served as the foundation of the enactment. It deals concisely and well with the subject. Why should we so nearly assimilate the devolution of realty and personalty as we do in this Province, and, at the same time, retain senseless and puzzling differences? We adopted the Statute of Distributions as our rule as to the descent of personalty, 22 & 23 Car. II. cap. 10, and in 1851 we passed our Real Property Statute. By this means the descent of realty and that of personalty are brought very near the one to the other, but there remain distinctions difficult to bear in mind and not easy of explanation. The seventh section of the Statute of Distributions provides that there shall be no representation admitted among collaterals after brothers' and sisters' children. If the next of kin of the intestate should be nephews and nieces, a child of a deceased nephew or niece will not be admitted to share in the distribution. If the deceased left realty, the child of the deceased nephew would take his share.

Then again, in dealing with the law of contracts, why should we have one rule as to what is needed to bind in the case of personalty and another in the case of realty? No satisfactory reason can be assigned for this distinction, whilst much may be said against it. The more simple the rules for the guidance of men in their dealings with each other can be made, the less likelihood will there be of difficulty and misapprehension, and the less probability of those entanglements which result in a waste of time and power in litigation. During the past quarter of a century great progress has been made in the way of simplifying the practice in our Courts. Why should we not see that some well-defined principles be applied for our guidance as to property, whether real or personal, which would result in some model legislation, in place of the hap-hazard patchwork which deforms our present system?

We throw out these suggestions at this time, in the hope that those who may feel called upon to act in the premises, may have ample time to consider the subject, and, we trust, some measure tending to the accomplishment of the desired end, before the Legislature meets.

SELECTIONS.

THE LATE LORD HATHERLEY.

WILLIAM PAGE WOOD, Baron Hatherley, was the second son of Sir Matthew Wood, the friend of Queen Caroline. He was born on November 29, 1801, and was named after his uncle, William Wood Page, to whom he attributed the early taste he had for literature. In 1812 he went to Winchester College, where he was a pupil of Dr. Gabell and Dr. Williams. In May, 1818, he was a prefect, when the famous barring out took place; and young Wood, although distinguished for his industry and good conduct, found himself expelled, through refusing to give up the names of his schoolfellows engaged in the plot. He was afterwards sent to Geneva; and at the Genevan University he took up Roman law, and attended the lectures of, among others, the Professor Rossi who was afterwards assassinated while Minister to Pius IX. He was next sent on the Queen's behalf to Italy to collect evidence for the trial, and acted as translator and interpreter to the commissioners. The result of the inquiries upon his mind was the firm belief, to which he frequently testified since her death, in the innocence of the accused lady, although he would admit that she had been imprudent in needlessly exposing herself to suspicion. In 1819 William Page Wood joined his brother, the late Rev. Sir J. Wood, at Trinity College, Cambridge. He obtained a scholarship on his first trial, and was always in the first class at the examinations. As a junior soph he gained a prize for a declamation on the question, "Whether the Revolution or the Restoration had conferred the greater benefit on our country?" In October, he stood for a fellowship and was elected, although nearly rejected, by veto of the master and one senior, in consequence of the Radicalism of his prize declamation. The threatened veto was withdrawn; and afterwards Lord Hatherley, as a Cambridge University Commissioner, helped to deprive the master of the despotic veto he possessed. He was admitted a student of Lincoln's Inn on March 1, 1824, immediately after his Cambridge degree, and was called by the same learned society in 1827. He was a pupil of Master Roupell's for equity drafting, and studied conveyancing under Mr. John Tyrrell, a master of real property law. The Real Property Commission was constituted in 1830, with Lord Campbell at the head; and Lord Hatherley's early initiation into the mysteries of fines and recoveries, leases and re-leases, which preceded Lord Campbell's reforms, prepared him to welcome the simplifications of the law and procedure which followed. Being called to the bar on November 27, he took chambers with Mr. Lowndes (afterwards judge of a local Court at Liverpool) at 3 Old Square, and almost immediately got into practice as an equity draftsman and conveyancer; suffered in Court from the rudeness of Sir John Leach, and was consoled by the courtesy of Lord Lyndhurst. He changed his chambers in Old Square twice, and went to Stone Buildings in 1841, where he remained until his promotion to the bench. With the beginning of railway business, a lucrative period of employment before Parliamentary committees opened for Mr. Wood. In 1830 he was earning 800*l.* a year, and married Charlotte, the only daughter of Major Edward Moor, F.R.S., of Great Bealings, near Woodbury. Leaving the committee rooms, Mr. Wood attached himself to Vice-Chancellor Wigram's Court. In 1847 he was returned as member for the city of Oxford. He continued to represent that constituency till he became a Vice-Chancellor. Meanwhile (in 1845) he had been appointed Queen's Counsel. Having been Vice-Chancellor of the County Palatine since May 1849, he became Solicitor-General in Lord John Russell's Government on March 28, 1851, and was, according to the usual practice, knighted. Lord Chancellor Truro offered him the post of Vice-Chancellor in this year, but the Prime Minister requested his Solicitor-General to continue to act as law officer. He retired with his political chief in 1852, and went back to private practice. In the meanwhile, he had served on the commission for reforming the procedure in Chancery, and had been made an honorary D.C.L. of Oxford. On January 10, 1853, his party was again in office, Lord Aberdeen being Premier; and Sir William Page Wood took his seat as a Vice-Chancellor on Sir George Turner's joining the Lords Justices of Appeal. Few judges of first instance gave more confidence to suitors than Lord Hatherley. His judgments were not finished and elaborate compositions; they

were delivered extemporaneously, without prepared notes—a practice in which he was justified by the consciousness that so much writing was injurious to his health. In addition to his labours as a regular judge and on legal commissions, he was selected by Lord Chancellor Cranworth to act with Lord Wensleydale and Sir Lawrence Peel as arbitrators between Her Majesty and the late King of Hanover with reference to the Crown jewels claimed by the King. The four volumes of "Kay and Johnston's Reports," from 1855 to 1859, are devoted to his decisions. He became Lord Justice of Appeal on March 5, 1868; and it was a mark of the respect in which he was held that, on this occasion, Lord Justice Selwyn, whose appointment was of earlier date, gracefully gave up to him the seniority, in deference to his long services and experience. He was, however, to take precedence in the Court of Appeal in Chancery by a still higher title. Before the end of the year Mr. Gladstone was Prime Minister, and Sir W. Page Wood became his Lord Chancellor, being raised to the peerage by the title of Baron Hatherley, of Down Hatherley. He held this high office for four years, but retired in 1872, owing to increasing failure in eyesight, and was succeeded by Lord Selborne.

In the career of his nephew, Sir Evelyn Wood, Lord Hatherley took the greatest interest. The meeting of Sir Evelyn with his white-haired uncle was one of the most affecting scenes on the general's return from the Cape after the crushing of the Zulu rebellion; and in the recent operations in the Transvaal, when the news of Sir George Colley's defeat and death reached this country, the old lord was heard to utter his nephew's name in the night, as if he dreamt that Sir Evelyn also was meeting with disaster. Another occupation of Lord Hatherley's age was in his charities, which were manifold and generons. He had been some days prostrated by illness; and on Sunday, 10th inst., he died at his house in Great George Street, in his eightieth year.

As a judge, Lord Hatherley was greater as a Vice-Chancellor than as Lord Justice and Lord Chancellor. His patience, care, and acuteness were invaluable in the decision of the cases which came before him But Lord Hatherley can hardly be said to have left a mark on the jurisprudence of his country. He was sound and just in his decisions; but he was without any great originality of thought or expression. The form of his judgments is much against their permanence. They were almost always orally delivered, and not compressed and strengthened by being written, and they were always diffuse and frequently obscure. As a man he is an example of the class, fortunately common at the present day, who do more than volumes of argument to disprove the vulgar belief that the study and practice of the law have any prejudicial effect on morality and religion.—*Law Journal.*

CURIOUS CASES OF NEGLIGENCE.

Several recent cases of negligence seem to deserve a place among the humorous phases of the law. In *Camden and Philadelphia Steam Ferry Company* v. *Monaghan*, Pennsylvania Supreme Court, February 24, 1881, 10 W. N. C. 47, the plaintiff was a passenger by the defendant's ferry-boat from Camden to Philadelphia. As the boat approached the wharf she arose from her seat, along with the other passengers, and at the moment of the collision she was standing inside the cabin. The boat struck the bridge with such force as to throw the plaintiff down and produce the injury complained of. The court said: "Of course, it is true that if she had remained in her seat she would not have been injured, but it does not necessarily follow that her act of leaving her seat was contributory negligence. Had she occupied a manifest place of danger, as for instance, a position very near to the end of the boat where there was no railing, and been precipitated into the water by the shock of the collision, the contention of the defendant would be much more appropriate, and would, perhaps, be conclusive against her. But the position she was in at the moment of the accident was not one of apparent danger at all * * * It is the uniform habit of persons riding on steamboats to be upon their feet at will while the boat is in motion, and especially as it approaches the landing. It is one of the most comfortable and satisfactory features of steamboat travel that passengers are at liberty to move about from place to place on the vessel while it is in motion." Inasmuch as seats are usually provided for less than half the passengers, the argument

of the ferry company seems particularly impudent.

Another case was in an English county court, where the widow of a medical man sued the owner and occupant of a house for injuries inflicted on her by the bite of a dog belonging to one of them. The dog was savage when chained, as they well knew. The plaintiff, who was dependent on charity, had gone to the house to solicit aid, bearing a general letter of introduction. Not knowthe regular visitor's entrance, she inquired the way, and was directed to the back gates or tradesmen's entrance. She entered through an open door, and seeing no bell, or other means of signalling her arrival, she went to the foot of a staircase on one side of the stable-yard, and was there bitten by a dog, which was chained. It was held that she was on the premises for an unlawful purpose, namely, begging, and that the letter of introduction did not take her out of the category of beggars, not being addressed to anybody in particular. The court also held that there was no negligence on the part of the defendants, and that the plaintiff was herself negligent. Poor woman! she ought to have presented her letter to the dog. This case has excited considerable discussion in the English law journals. In the last number of the *Law Journal* a correspondent says: "Let me assure you that I have not 'taken up the cudgels on behalf of genteel beggars.' Persons of this description constitute, in my opinion, one of the minor pests of society."

The action of *Buckley* v. *Fitzgerald*, in Ireland, was brought to recover damages for injuries occasioned to the plaintiff's wife by a bull. Popham sold to Fitzgerald certain young bulls, which the vendor agreed to deliver at Bandon railway station, to be there taken charge of by the vendor. The animals were, as alleged, driven in a careless manner, without ring or rope, through the town of Bandon (in abandoned manner, as it were). Mrs. Buckley, the plaintiff's wife, stated that she was sitting at her kitchen fire, about half-past nine o'clock in the morning, with a child in her arms, when she noticed a large bull in the street. She went to close the door, but the bull rushed against her and knocked her down, and then ran into the kitchen. She called as loudly as she could for assistance, and while she was sitting on the floor she saw another bull trying to get in. Some men then came and drove the animal out, but the sight left her eyes, and she became insensible. She sustained a slight concussion of the spine beside the fright. The jury found negligence, but could not agree whether the animals were in charge of the defendant's servants. So their verdict was set aside. How woman-like it was to go and shut the door when she saw the bull in the street! What more unlikely than that a bull should try to enter a house! But it is the unexpected that always happens. Probably the bull would never have thought of going in if he had not seen himself thus snubbed. This we know is a trait of the national Bull —to try to get in at every open door and every door shut against him—as in India, Afghanistan and South Africa, but although there is a tradition about an æsthetic bull in a china shop, this is the first instance to our knowledge of a culinary bull in a kitchen.

Coombe v. *Moore* was heard at Westminster, May 9th, before Mr. Justice Bowen and a jury. The parties were neighbours, living about 200 yards apart. The defendant is an American, and on July 4th last he was desirous of celebrating the anniversary of the declaration of the independence of the United States of America, and had invited several friends to his house on the occasion, and part of the entertainment which he had prepared for his guests was a display of fireworks. July 4th was a Sunday; and when the Sunday had passed, between twelve and one o'clock on the morning of the 5th, some fire-works were let off in defendant's garden. The reports of the fire-works were described by witnesses as having a sound like an explosion; and evidence was given that twelve or fourteen rockets had been let off on the occasion in question. The plaintiffs were aroused by the first report, and Mr. Coombe went down stairs, followed by Mrs. Coombe. While he was in his garden, he saw four or five rockets, the sticks and cases of which fell into his garden. Mrs. Coombe was much alarmed, and an attack of hysteria supervened, which was followed by neuralgia. Under the doctor's advice she went by sea for a trip to Ireland, which improved, though it did not quite restore, her health. Now who can conceive a case so harrowing to the feelings of the British citizen? And yet, thanks to native magnanimity, the jury let off the defendant for one farthing damages! If the hysterical lady had gone to the window she would have discovered that the day of judgment was not at hand. But she probably wanted a jaunt, and so worked upon

her husband's feelings. A supplementary journey to Paris would undoubtedly have quite restored her health.

Moore v. *Whitehaven Hematite Iron and Steel Co.*, in the Whitehaven county court, was an action of damages for the killing of an employé in a colliery, by the fall of masses of ice adhering to the sides of the shaft. Here it seems the "reaper death" made use of an icicle.—*Albany Law Journal.*

OFFENCES INDUCED BY POLICE OFFICERS.

"When we wish to overreach scoundrels who are at open war with society, every stratagem is allowable by which to effect their conviction, except endeavouring to provoke the commission of crime." This was the maxim of the famous French police spy Vidocq, but, though he flattered himself on never having outstepped the limitation it imposed, readers of even his own memoirs cannot but consider that in some of the incidents of his marvellous career he allowed himself to venture beyond the strict line of police duty. Of the nature of that duty he had been well informed by M. Henry, chief of the division of security in the prefecture of police, whose impressive advice is worth reproducing. "Remember well," said that excellent magistrate, "that the greatest scourge of society is he who urges another on to the commission of evil. Where there are no instigators to bad practices, they are committed only by the really hardened; because they alone are capable of conceiving and executing them. Weak beings may be drawn away and excited: to precipitate them into the abyss, it frequently requires no more than to call to your aid their passions or self-love; but he who avails himself of their weakness to procure their destruction, is more than a monster—he is the guilty one, and it is on his head that the sword of justice should fall. And to those engaged in the police, they had better remain for ever idle, than create matter for employment. The police is instituted as much to correct and punish malefactors, as to prevent their committing crimes; but on every occasion I would wish it to be understood, that we hold ourselves under greater obligations to that person who prevents one crime, than to him who procures the punishment of many." In after years Vidocq himself found many tempters to crime among his own envious companions in the force; but, thanks to the advice and warning of M. Henry, he proved invulnerable.

Two recent cases, one of them English and the other American, will illustrate the legal effect of inducements to crime held out by police officers, and of their acting in concert with the criminals. In *Reg.* v. *Hancock and Baker* (38 L. T. N. S. 787), Hancock was indicted for stealing a cigar, the property of his master (Gabriel), and Baker was indicted for feloniously receiving it, knowing it to be stolen. Hancock pleaded guilty; and the facts appearing in evidence against Baker were as follows:—Gabriel, a cigar manufacturer, who had already missed some goods from his establishment, saw his shop boy appropriating a cigar, and thereupon sent for Reid, a detective. Reid searched Hancock, and having found a cigar in his pocket, and questioned him, marked it and returned it to him, in his master's presence, at the same time giving him five other cigars and instructions how to act. Hancock thereupon went, followed by Reid, to a place where Baker was at work, and gave the cigars to him. Hancock deposed that he had taken the first cigar because Baker had told him to get as many as he could, and promised to give him something for them. When Reid saw the cigars handed to Baker, he accosted him. Baker said, "I know you are a constable, and here they are," at the same time giving up the six cigars, one of them being the marked one; and Reid said, "You've incited this boy to rob his master, and received the cigars he has stolen." Beyond question, Reid himself had here incited Hancock to induce or enable Baker to commit the crime of receiving them; but the matter does not appear to have been the subject of any recorded judicial observation, nor are we prepared to say that in this instance the officer outstepped the line of propriety, but as illustrating how far the police may legitimately act in such matters, the case is worth noting in this aspect. Baker was convicted, and the question on which the case ultimately turned, on coming before the Court for Crown Cases Reserved, was as to whether or not the cigars were stolen property at the time they were received, the master and the policeman having acted in concert in supplying Hancock with them and

instructing him what to do with them. It was contended, on Baker's behalf, that there was no case to go to the jury, as the subject of the indictment had been taken out of the possession of the thief (Hancock) by the detective in the presence of the owner, and so restored to him, and had been then given back for a specified object to the thief, who was shown to be acting under his master's instructions by the fact of the other cigars being given to him also. "At the time the cigar was received by the prisoner, it had been reduced into the possession of the master, or, if you please, of the police, and Hancock was then employed as an instrument to detect Baker," said Cockburn, C. J.; and he held that the conviction should be quashed, as the case was undistinguishable in principle from *Reg.* v. *Dolan* (24 L.J.M.C. 59, Dears. C. C. 436, 6 Cox C. C. 449), where Lord Campbell evidently assumed that what was done by the police was done in concert with the master, as was also to be inferred in the present case. Huddleston, B., said, "The cigar was taken by the policeman, and the instructions what to do with it were given by the policeman, but then the master was present all the time." In *Reg.* v. *Dolan*, Cresswell, J., said: "If it were necessary to hold that the policeman by taking the stolen goods out of the pocket of Rogers restored the possession of them to the owner, I should dissent. The goods in the policeman's hands were in the custody of the law, and the master could not have brought trover for them; but when they were given back to Rogers, and the master desired him to go and sell them, the master, I think, may be said to have employed Rogers for that purpose." That learned judge treated the thief as the agent of the master, for the purpose of detecting the receiver. It appears to us that the court were quite right in this case in basing their decision, quashing the conviction, not on the ground that the goods had been reduced into the master's possession (see *Reg.* v. *Peech*, 38, L. T. N. S. 788), but on the ground of the master and employer having acted in concert in reference to the matter in issue.

In *People* v. *Collins* (18 *Albany Law Journal*, 271), it was a sheriff and not a policeman who was implicated in inducing to the crime, but he was acting in the capacity of a police officer, and in principle the case is directly in point on the subject in hand. In that case there was an appeal from a judgment of conviction upon an indictment for burglary, and the facts were as follows:—There was evidence tending strongly to show that the defendant requested Parnell to enter a certain building in the night time, and to steal therefrom a sum of money which he knew to be concealed there; and that the money, when stolen, should be divided between them. The evidence also tended to prove, that instead of accepting and acting upon this proposal, Parnell immediately informed the sheriff of it, who, after consultation with the district attorney, advised Parnell to pretend to the defendant that he accepted the proposition and would carry out the enterprise. It was, thereupon, agreed between Parnell and the sheriff that when the money was taken it should be marked with acid so that it could be identified; and that when the money was delivered to the defendant a signal should be given by Parnell to enable the sheriff to arrest the defendant with the money in his possession. The evidence tended to prove that this programme, as agreed upon by Parnell and the sheriff, was carried into effect; that Parnell entered the building, secured the money, marked it with acid, delivered part of it to defendant, gave the signal as agreed upon, and the sheriff thereupon arrested the defendant with the money in his possession. On this state of the evidence the court instructed the jury that, if it was agreed between Parnell and the defendant that the former should enter the building and steal the money, to be divided between them, and if, in pursuance of the agreement, Parnell did enter the building and take the money and divide it with the defendant he was guilty of burglary, and the jury should so find "without regard as to the part taken in the offence by the witness Parnell, or as to the motives or intentions of said Parnell." This instruction was held to have been erroneous by the Supreme Court of California, saying:—"If Parnell entered the building and took the money with no intention to steal it, but only in pursuance of a previously-arranged plan between him and the sheriff, intended solely to entrap the defendant into the apparent commission of a crime, it is clear that no burglary was committed, there being no felonious intent in entering the building, or taking the money. If the act of Parnell amounted to burglary, the sheriff who counselled and advised it was privy to the offence, but no one would seriously contend, on the foregoing facts, that the sheriff was guilty of burglary. The evi-

dence for the prosecution showed that no burglary was committed by Parnell, for the want of a felonious intent, and the defendant could not have been privy to a burglary, unless one was committed."—*Irish Law Times.*

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COMMON LAW CHAMBERS.

IN RE OSLER AND THE TORONTO GREY AND BRUCE RAILWAY COMPANY.

Wilson C. J.] [July 3.

O. being the holder of fourteen bonds of the Railway Company, issued on 1st of May, 1876, payable on 1st January, 1881, with interest meanwhile half yearly at 6 per cent. per annum, requested the Secretary of the Company to register the bonds under 38 Vict., ch. 56. This the Secretary refused to do, unless the intermediate transfers were produced and registered at the same time.

Held, that the Secretary was bound to register the bonds without the production or registration of the transfers, and the summons for a mandamus was made absolute with costs to be paid by the company.

McCarthy, Q.C., and *Osler*, Q.C., for the summons.

S. H. Blake, Q.C., showed cause.

CHANCERY.

Ferguson, V. C.] [July 23.

LANCEY v. JOHNSON.

Lessor and lessee—Right to bore for oil—Injunction.

The plaintiff, in consideration of $25.00 paid by defendant, executed in his favour a lease of a small plot of land in the township of Enniskillen, at a yearly rent of one cent if demanded, with the right on the part of the defendant to remove all buildings at any time during the lease. The lease contained no covenant on the part of the lessee other than those to pay rent and to pay taxes, and it was silent as to any right on the part of the lessee to dig for oil.

Held, that *prima facie*, the lessee had not the right to bore for oil, and having done so and commenced operations in pumping crude oil, an injunction was granted to restrain the further removal of oil from the premises until the hearing of the cause.

Rae and *Moncrieff*, for plaintiff.

Street, for defendant.

Ferguson, V. C.] [July 23.

YOUNG v. HUBER.

Injunction—Infant's rights as a co-partner—Practice—Parties.

In a suit by an infant partner against his co-partner, praying a dissolution of the partnership, the appointment of a receiver, &c., a decree *pro confesso* was pronounced, and while the taking of the accounts, pursuant to an agreement for a continuance of the partnership, was being proceeded with, certain creditors of the firm obtained judgments and executions at law against the adult partner, the infant having been kept in ignorance of the proceedings at law, until the Sheriff had seized and was about to sell the whole of the property of the alleged partnership.

Held, on a motion to restrain proceedings on such executions, that the proceedings at law were not within the provisions of R. S. O., ch. 123, sec. 8, and that the sale should be restrained.

Held, also, that the execution creditors might be added as parties, in order to be bound by the injunction, on motion simply.

Moss and *King*, for the plaintiff.

Muir, contra.

NOTES OF RECENT DECISIONS.

Malicious prosecution—Reasonable and probable cause.

A trading firm, by making false statements to a mercantile agency as to their capital, obtained a high and incorrect rating, on the strength of which they got credit for goods, which they handed over to a relative in payment of an antecedent debt, and, within a month after, a writ in insolvency issued against them. The vendor of the goods on discovering the facts, and being so advised by counsel, prosecuted the firm on the charge of obtaining goods by false pretences.

Held (*per* Torrance, J.) that there was reasonable and probable cause for the prosecution, and an action of damages would not lie. BOWES v. RAMSAY; 4 Leg. News 227.—Quebec.

Contract—Interpretation—Insolvency.

Where a lease, made during the existence of the Insolvent Acts, was to be terminated by the insolvency of, or the making of an assignment by, the tenant, *held* (*per* Torrance, J.) that the making of a voluntary assignment by the tenant after the repeal of the Insolvent Acts, did not terminate the lease.—BUDLEY ET AL. v. BOND, *Ib.*—Quebec.

Corporation—Illegal arrest.

An arrest under the Vagrant Act (32-33 Vict. [Can.] c. 28), for indecent exposure, cannot be made without warrant after an interval of time following the offence, and where such unauthorized arrest was made, the city was held liable (*per* Torrance, J.) in damages for the act of its policeman.—WALKER v. THE CITY OF MONTREAL, *Ib.* 215—Quebec.

Conditional sale—Sale of horse on trial—Death of horse before trial.

The plaintiff sold a horse to the defendant upon a condition that the horse should be tried by the defendant for eight days, and returned by him at the end of that time if he did not think it suitable for his purposes. The horse died within such eight days without fault of either party. *Held* (by Denman, J.), that there was no absolute sale at the time of the horse's death, and therefore that the plaintiff could not recover the price. ELPHICK v. BARNES, 49 L. J. Rep. Q. B. 698.

Issue of writ same day as cause of action—Fiction of priority.

The statement of claim alleged that on July 2, and before the issuing of the writ, the defendant sat and voted as a member of the House of Commons without having made and subscribed the required oath, and that the plaintiff sued for the penalty of 500*l.* Demurrer on the ground that the statement of claim was bad in law, as it alleged that the defendant sat and voted on the day on which the writ was issued.

The defendant, in person, contended that the issue of the writ was a judicial act; and that the writ must, therefore, be taken to have been issued before the commission of the alleged offence, in accordance with the fiction of law that a judicial act dates from the earliest period of the day on which it is done.

On the other side it was contended that the issue of the writ was not a judicial act.

The Court (Denman, J., and Williams, J.) held that the fiction of law could not override the positive averment that the sitting and voting took place before the issue of the writ.—CLARKE v. BRADLAUGH, 1. Q. B. Div. June 21.

Negligence—Injury to person stopping upon street from fall of defective wall.

A person lawfully passing along a street, who stops on the door-sill of a house fronting on the street, for the purpose of adjusting his shoe, and while thus occupied, his head being within the lines of the street, without any negligence on his part, is injured by a brick falling on his head, in consequence of the dilapidated condition of the wall of the house, has a right of action against the owner of the house for the injury inflicted. *Deford* v. *State*

30 Md. 205; *Irwin* v. *Sprigg*, 6 Gill, 200; *Copeland* v. *Hardengham*, 3 Campb. 348; *Maenner* v. *Carroll*, 46 Md. 212; *Butterfield* v. *Forrester*, 11 East, 60; *Bridge* v. *G. J. R. Co.*, 3 M. & W. 244; Angell on Highw. 347. Travellers on a street have not only the right to pass, but to stop and rest on necessary and reasonable occasions, so that they do not obstruct the street, or doorways, or wantonly injure them. Douglas, 745; 3 Steph. N. P. 2768; 2 Bl. Com., note 26, by Christ.; *Adams* v. *Rivers*, 11 Barb. 390. A ruined or dilapidated wall is as much a nuisance, if it imperils the safety of passengers or travellers on a public highway, as a ditch or a pit-fall dug by its side.—MURRAY v. MCSANNE, Maryland Court of Appeals.

Insurable interest—Mechanic's lien upon an equity of redemption.

1. Where a contractor for a building is entitled to a lien, which lien is subject, however, to a prior mortgage, such interest in the equity of redemption is an insurable interest.

2. If, during the continuance of a policy upon such an interest, but before the steps for perfecting the lien have been completed, the property is destroyed by fire, the policy holder is not under any obligations to perfect and enforce his lien for the benefit of the insurer, unless the insurer comes forward, pays the insurance, gives notice of a desire to be subrogated to his rights, and make a tender of indemnity against expenses.—ROYAL INSURANCE CO. v. STINSON, Supreme Court, U. S.

Fraud—Limitations—Notice.

1. The entry of satisfaction upon the record by a judgment-creditor, after he has assigned his interest in the judgment, is actual fraud.

2. The statute of limitations does not begin to run against a cause of action, growing out of fraud, until the fraud is discovered.

3. No party injured by a fraudulent entry upon a public record will be affected by constructive notice. In cases of contract and in actions *ex delicto quasi ex contractu*, the statute of limitations begins to run from the breach of contract or duty, and not from the time when the damage accrues.—MITCHELL v. BUFFINGTON, Supreme Court, Penn., U. S.

Patent right—Execution—Creditor's bill.

The interest of a party in letters patent for an invention may be sold upon execution, and its assignment in writing, as required by the laws of the United States, enforced under the State law. Proceedings supplementary to execution are intended as a substitute for a creditor's bill, as formerly used in chancery.—PACIFIC BANK v. ROBINSON, Supreme Court, Cal., U. S.

LAW STUDENTS' DEPARTMENT.

EXAMINATION QUESTIONS AND ANSWERS.

We give below a further instalment of questions and answers from the English *Bar Examination Journal*, a sample of which we gave in our last issue:

Q.—4. If one of co-partners seised of freehold land used for partnership purposes dies intestate, who becomes entitled to his share of the real estate not required for payment of his debts?

A.—The effect of the contract of partnership is to impress all the assets of the partnership with a trust for sale and division amongst the members of the firm. Hence all real estate comprised in the assets of a partnership is considered as converted into personal estate. It follows, therefore, that on the death of one partner, intestate, his share of the assets, whether realty or personalty, is payable to his administrator, who will hold the same on the same trusts as any other personal estate (Lindley on Partnership, 3rd Ed. 692; 1 W. & T. L. C. Eq. *Lake* v. *Craddock*).

Q.—5. Under what circumstances is the occupier of a house liable to a person whom he permits or invites to enter the premises, for injury sustained by reason of their dangerous condition?

A.—If the dangerous condition of the premises was apparent to the party injured when he entered, the occupier will not be liable.

If the danger was not apparent, the occupier will not be liable if he was himself unaware of the unsafe state of the premises, except, perhaps, where their dangerous condition was due to his own negligence, in which case he would be liable if the party injured paid money for admission to the house, or came there on lawful business, though (perhaps) not if he entered merely as a guest without payment. If the occupier was aware of the danger, he will in general be liable if he neglected to give proper warning thereof to the party injured when the latter entered. (See Underhill on Torts, 2nd ed. 132—134, and cases cited; *Lax* v. *Corporation of Darlington*, 5. Ex. D. 28; Indermaur C. L. 2nd ed. 336, 337.)

Q.—6. What is meant by absolute as distinguished from qualified privilege in the publication of defamatory words, and in what cases has it been held to exist?

A.—The privilege is said to be absolute in those cases where the statement is privileged, even though malicious and made without reasonable or probable cause. It is qualified in those cases where the statement is privileged only if made without actual malice.

The privilege is absolute as regards statements made by a suitor, prosecutor, witness, counsel, or juror, in the course of judicial proceedings, whether civil or criminal; or by a judge, magistrate, or other person presiding in a judicial capacity in any court or other tribunal legally constituted, or by a member of either house of Parliament in the course of parliamentary proceedings. (See Underhill on Torts, 2nd ed. 94—98; Indermaur C. L. 2nd ed. 316, 317.)

Q.—7. What are the principal offences connected with threats and menaces, and how are they respectively punishable?

A.—Sending a letter or writing threatening to murder, or to burn or destroy property, is felony punishable with penal servitude to the extent of ten years.

Sending a letter or writing demanding with menaces, and without reasonable cause, money or other property, is felony punishable with penal servitude to the extent of life. A similar demand made otherwise than in writing, and with intent to steal, is felony punishable with penal servitude to the extent of five years.

Sending a letter containing threats, or otherwise threatening, to accuse a person of a crime punishable with death or penal servitude for not less than seven years, or of a rape or attempt to commit a rape, or of an unnatural offence, is felony punishable with penal servitude to the extent of life.

Compelling a person by violence or threat to execute a deed, &c., is felony, punishable with penal servitude to the extent of life.

Threatening to publish, or proposing to abstain or prevent from publishing a libel, in order to extort money, is a misdemeanor punishable by imprisonment not exceeding three years (Harris & Tomlinson Cr. L. 2nd ed. 106, 114).

Q.—8. Define and give an example of each of the following:—

An executory trust.
A resulting trust.
A precatory trust.
A constructive trust.
A voluntary trust.

A.—(1.) When a deed, will, or other instrument directs any property to be settled in a manner, which is indicated but not set out verbatim, such direction constitutes an executory trust.

Example.—A testator directs his executors to lay out £50,000 in the purchase of land, and to cause such land to be settled on the testator's eldest son and his issue in strict settlement, in the usual manner, with all the usual clauses.

(2.) When a settlor vests property in trustees and declares trusts of it, which do not exhaust the whole interest therein, and the events so happen that these trusts fail, then the property is held on trust for the settlor or his representatives, and this last trust is called a resulting trust.

Example.—A. vests funds in the names of trustees and directs them to pay the income thereof to B. for life, and divide the capital after B.'s death equally among all B.'s children who attain twenty one. B. dies and all his children die under twenty-one. The property is held on trust for A. or his representatives.

(3.) When a testator makes a devise or bequest, and adds precatory words expressing a wish that the devisee or legatee should confer a

benefit on some other person or persons; then if there is certainty of the subject matter referred to in these precatory words, certainty of the objects of the testator's wishes, and certainty of the interests they are to take, a trust is created in their favour, and this trust is called a precatory trust.

Example.—A testator bequeaths certain property to his wife, heartily beseeching her at her death to divide it equally amongst their children. This gives rise to a trust for the children after the wife's death.

(4.) When a trustee seeks to appropriate for his own use any money or property which ought to be added to the trust property, he will be held a constructive trustee of it for the beneficiaries.

Also a person buying trust property with notice that the sale to him is a breach of trust, may be declared a constructive trustee of the property.

Example.—A trustee of leaseholds, which are expiring, procures a new lease of them to be granted to himself. He will be held to be a constructive trustee of such new lease.

(5.) A trust created by a settlor without any valuable consideration being in any way given for it, is a voluntary trust.

Example.—A legacy of £1,000 bequeathed to a married woman, is paid to her husband by her direction. He then, of his own accord, executes a settlement of it on his wife and children. This is a voluntary trust. (Snell, Pt. 2, cc. 1—5.)

Q.—9. Can a trustee of an estate ever, and, if so, under what circumstances, and how, acquire a good title as purchaser of it?

Draw any distinctions which may be material with reference (*a*) to the nature of the trust; or (*b*) to the position of the beneficiaries.

Explain the position of a trustee who has bought the trust estate without acquiring a good title.

A.—(1.) If the beneficiaries are all in existence, and *sui juris*, and they consent to the sale, and the trustee gives them all possible information, and pays a fair price for the property.

(2.) If the trustee is willing to give a better price than anybody else, the Court may authorise him to purchase the property, although the beneficiaries are not all *sui juris*.

The rule is that a trustee cannot buy on a sale by himself. He may buy on a sale by the beneficiaries; or on a sale by the Court in the manner above mentioned. Moreover, if he is only a trustee for some collateral purpose, and not trustee for sale, the rule does not apply (Lewin, c. 18, s. 3).

A trustee, who has bought the estate without acquiring a good title may be called upon to reconvey the estate and account for the rents and profits of it, on payment of his purchase-money with interest at 4 per cent., and any monies laid out by him upon the property.

REVIEWS.

A COLLECTION OF LATIN MAXIMS, literally translated, intended for the use of students for all legal examinations. London: Stevens & Haynes, 1881.

Maxims have been since the world began, and doubtless will last as long. They are cores round which cluster appropriate knowledge and kindred thoughts. They are liable to abuse, of course, and often used to hide ignorance under a semblance of wisdom, and when quoted in their Latin form, are sometimes used as "a means for those who know very little Latin to show that they know some." The collection before us is not pretentious and disarms criticism by its simplicity and general correctness. Students would do well, early in their studies, to commit these maxims to memory, and subsequent reading will often be systematized and more easily remembered.

CORRESPONDENCE.

Uncertified Legal Practitioners.

To the Editor of the CANADA LAW JOURNAL.—

SIR,—As one of the profession, who suffers most severely through the competition of uncertified legal practitioners, I anxiously scanned

the report in your columns of the proceedings of the last convocation of Benchers to see what measure of relief would be propounded by the committee appointed for that purpose. Of course I was disappointed. But I had the satisfaction of seeing that two of the newly elected Benchers, who claimed our support on the promise of their active efforts in the matter, were added to the committee. This leads us to hope that we shall before the end of another session of parliament be placed upon as good a footing, at least, as the inferior professions.

It may not be out of place to repeat some suggestions that I have already made with regard to the method of relief. A measure of the following kind could, it seems to me, be passed without difficulty, and would afford reasonable protection at the same time to the public at large, to the profession, and to the qualified among the, at present, uncertified conveyancers—viz: a measure giving to the Law Society power to prescribe examinations for all persons other than duly certified attorneys, upon legal subjects, and grant certificates of fitness; to impose examination fees, and annual fees to be afterwards paid by all such persons; and imposing penalties upon all persons acting as conveyancers, or collecting agents, or practising in the surrogate or Division Courts without such certificates.

This, in short, seems to me the plan that is the most reasonable, and least likely to be rejected by that portion of the Legislature which is so jealous of lawyers and their privileges.

Hoping that our newly elected Benchers will fulfil their fair promises, and aid in devising a suitable remedy for the evils we complain of,

I remain yours &c.

J. W. S.

August 11, 1881.

To the Editor of the CANADA LAW JOURNAL.—

SIR,—"Hawkins on Wills" is out of print. Will candidates who present themselves for certificates of fitness before Hilary term of 1882, and who cannot procure this work, be examined on it? A reply through your Journal will much oblige,

Yours, &c.

STUDENT.

[This book must be read so long as it is on the curriculum. Though the English edition may be out of print, there is an American edition which would answer the purpose.—EDS. L. J.]

FLOTSAM AND JETSAM.

EX-JUDGE TYLER, of California, the other day, finding himself opposed by a woman lawyer, Mrs. Clara S. Foltz, lost his temper, and told her that "a woman's proper place was at home, raising children." The lady answered him promptly: "A woman had better be engaged in almost any business than raising such men as you are, sir,"—*Ex.*

THE will, dated July 26, 1880, of the Hon. Arthur Annesley, formerly a captain of the Grenadier Guards, late of 11 Curzon Street, Mayfair, who died on April 26 last, at Cannes, was proved, on the 28th ult., by the Hon. Mrs. Clara Annesley, the widow and sole executrix, the personal estate being sworn under £2,000. The testator simply says: "All that I possess in the world I leave to my wife." The deceased was the fourth son of William Richard, third Earl Annesley, and brother of the present peer. —*Law Journal.*

IN giving judgment (differing from Fitzgerald, B.,) in *Dalton* v. *The Corporation of Clonmel*, on the 2nd inst., Dowse, B., is reported to have observed: "This view he took with great diffidence, as his brother Fitzgerald did not agree with him. But if there were to be two judges there was no use in having one a mere echo of the other. He was there to give his opinion, and that was what he was paid for. The longer he lived the more disinclined he was to set aside the verdict of jurors, if it was only because of the fact that the longer he lived the lazier he got. In his young days as a judge he was fond of assuming the position of juror, but now he liked to have a jury to lean upon, and notwithstanding all that had been said there could be no better tribunal than a jury to try a question of fact. They were infinitely better than any judge."—*Irish Law Times.*

Law Society of Upper Canada.

OSGOODE HALL.

EASTER TERM, 44TH VICT.

During this Term the following gentlemen were called to the degree of Barrister-at-Law:—

George Bell, with honors; John O'Meara, Charles Henry Connor, George Macdonald, John Birnie, jr., Charles Egerton Macdonald, Howard Jennings Duncan, Stewart Campbell Johnstone, Lendrum McMeans, William Boston Towers, Francis Edward Galbraith, Charles Wright, John Kelley Dowsly, Chas. Herbert Allen, Charles Elwin Seymour Radcliffe, James Leland Darling, John Clark Eccles, George William Baker, Hedley Vicars Knight, George Ritchie.

(The names are placed in the order of merit).

And the following gentlemen were admitted into the Society as Students-at-Law, namely:—

GR DUATS.

Adam Carruthers, B.A., James Alexander Hutchinson, B.A., George Frederick Lawson.

MATRICULANTS OF UNIVERSITIS.

John L. Peters, Morris Johnson Fletcher, Francis Cockburn Powell, Toronto University.

JUNIOR CLASS.

Herbert Gordon Macbeth, Alson Alexander Fisher, William Edward Sheridan Knowles, Thomas Hobson, obert Alexander Dickson, Peter D. Cunningham, Alexander McLean, William Thomas McMullen Miron Ardon Everetts, William John McWhinney Richard Armstrong, Alexander Duncan McLaren Edward Corrigan Emery, John Craine, Joseph McKenzie Rogers, W. Arthur Ernest Kennedy, Geo. Herbert Stephenson, Arthur W. Wilkin, Walter George Fisher.

And the examination of William Lesslie Beale was ed wedallohim as canArtil Clerk.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

Articled Clerks.

1881.
- Ovid, Fasti, B. I., vv. 1-300; or, Virgil, Æneid, B. II., vv. 1-317.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History—Queen Anne to George III.
- Modern Geography—N. America and Europe.
- Elements of Book-keeping.

In 1882, 1883, 1884 and 1885. Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

Students-at-Law.

CLASSICS.

1881.
- Xenophon, nabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero in Catilinam, II., III., IV.
- Ovid, Fasti, B. I., vv. 1-300.
- Virgil, Æneid, B. I., vv. 1-304.

1882.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum, (B. G. B. IV. c. 0-36, B. V., c. 8-23.)
- Cicero, Pro Archia.
- Virgil, Æneid, B. II., vv. 1-317.
- Ovid, Heroides, Epistles V. XIII.

1883.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum.
- Cicero, Pro Archia.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Heroides, Epistles V. XIII.

1884.
- Cicero, Cato Major.
- Virgil, Æneid, B. V., vv. 1-361
- Ovid, Fasti, B. I., vv. 1-300.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.

1885.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid Bb. I., II., III.

ENGLISH.

A Paper on English Grammar.
Composition.
Critical Analysis of a selected Poem :—
1881.—Lady of the Lake, with special reference to Cantos V. and VI.
1882.—The Deserted Village.
The Task, B. III.
1883.—Marmion, with special reference to Cantos V. and VI.
1884.—Elegy in a Country Churchyard.
The Traveller.
1885.—Lady of the Lake, with special reference to Canto V.
The Task, B. V.

HISTORY AND GEOGRAPHY.

English History from William III. to George III., inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek :—

FRENCH.

A paper on Grammar.
Translation from English into French Prose :—
1881.—Emile de Bonnechose, Lazare Hoche.

OR, NATURAL PHILOSOPHY.

Books.—Arnott's Elements of Physics, 7th edition, and Somerville's Physical Geography.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination, to be passed in the third year before the final Examination, shall be :—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery; O'Sullivan's Manual of Government in Canada; the Dominion and Ontario Statutes relating to Bills of Exchange and Promissory Notes, and Cap. 117, R. S. O., and amending Acts.

The Subjects and Books for the Second Intermediate Examination to be passed in the second year before the Final Examination, shall be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing, (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law; Underhill on Torts; Caps. 49, 95, 107, 108, and 136 of the R. S. O.

FINAL EXAMINATIONS.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Smith on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Harris's Principles of Criminal Law, and Books III. and IV. of Broom's Common Law, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Smith on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

The Primary Examinations for Students-at-Law and Articled Clerks will begin on the Second Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

The Second Intermediate Examination, on the 3rd Tuesday, except in Trinity Term.

The First Intermediate, on the 3rd Thursday, except in Trinity Term.

The Attorneys' Examination, on the Wednesday, and the Barristers' Examinations, on the Thursday before each of the said Terms.

FEES.

Notice Fees	$1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Attorney's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fees, each,	1 00
Fee in Special Cases additional to the above	200 00

The following changes in the Curriculum will take effect at the examination before Hilary Term, 1882:—

FIRST INTERMEDIATE.

Williams on Real Property; Smith's Manual of Common Law; Smith's Manual of Equity; the Act respecting the Court of Chancery; Anson on Contracts; the Canadian Statutes relating to Bills of Exchange and Promissory Notes, and Cap. 117 R.S.O. and Amending Acts.

SECOND INTERMEDIATE.

Leith's Blackstone (2nd edition); Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages and Wills); Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act; Caps. 95, 107 and 130 of the Revised Statutes of Ontario.

FOR CERTIFICATE OF FITNESS.

Taylor on Titles; Hawkins on Wills; Taylor's Equity Jurisprudence; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and the Pleadings and Practice of the Courts.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's Principles of Criminal Law, and Books III. and IV. of Broom's Common Law; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills; the Statute Law and the Pleadings and Practice of the Courts.

Canada Law Journal.

VOL. XVII. SEPTEMBER 1, 1881. NO. 16.

DIARY FOR SEPTEMBER.

2. Fri..Beauharnois, Governor of Canada, 1726.
3. Sat..Trinity Term ends.
4. Sun..*12th Sunday after Trinity.*
7. Wed..Court of Appeal sittings begin.
10. Sat..Sebastopol taken, 1855.
11. Sun..*13th Sunday after Trinity.* Peter Russell, President, 1796.
12. Mon..Frontenac, Gov. Canada, 1672.
13. Tues..Co. Ct. sittings for York begin. Quebec taken by British, under Wolfe 1759.
17. Sat..First U. C. Parliament met at Niagara, 1792.
18. Sun..*14th Sunday after Trinity.*
19. Mon..Lord Sydenham, Gov. General, died, 1841.
24. Sat..Guy Carleton, Lieutenant-Governor, 1766.
25. Sun...*15th Sunday after Trinity.*
29. Thurs..Michaelmas Day.
30. Fri..Sir Isaac Brock, President, 1811.

TORONTO SEPT. 1st., 1881.

A CORRESPONDENT sends us a communication on the subject of magisterial abuses. As it has already been published, we do not of course reproduce it. It is the old story of rapacity and ignorance on the part of country justices, better told by Shakespeare than it has been since, and as true now as in his time. The darkness of the middle ages seems to cling to the skirts of this grotesque ghost of law and order.

THE following question in one of the papers at the recent Law Society examinations: "Explain how in some cases a Court of Equity in exercising their jurisdiction to restrain a party from doing an act, is in effect *compelling* a specific performance of *that act?*," reminds us of rather a good thing quoted by Sir Henry Maine in his Early History of Institutions, which shows that even in the eleventh century the faculty for making bulls was fully developed, at any rate in Ireland. An ancient Brehon text-writer, after asking the question, "How many kinds of contracts are there?" gives the answer, "Two, a valid contract, and an invalid contract." A mode of classification which, as Sir Henry Maine observes, would scarcely have pleased Bentham or Austin.

READERS of Mr. Todd's admirable work on Parliamentary government in the British Colonies will be much interested at the news of the conclusion of the lengthy "deadlock in Victoria,"—the history of which is so graphically set out by him. It appears from Melbourne advices up to June 21st ult. that a Reform Bill had at length passed both Houses. On the one hand the Council have consented to dispense with their claim to have two members in every Cabinet, and also to reduce the qualification for membership to £100 rating instead of £150, their previous minimum. On the other hand the Assembly have abandoned their demand to have the franchise for mere occupiers reduced from £25 to £10 rental. The result appears fully to justify the steadfast refusal of the Imperial Government to apply the *Deus ex machinâ.*

WE commence in the number for this month what we hope to make a permanent and very special feature of our Journal. It is a selection from English Reports of such current practice cases as illustrate and interpret our Judicature Act and Orders. At the heading of each case

will be found a reference to the general orders affected, and at the foot a note stating whether the Imperial and Ontario Orders concerned are or are not identical. Such English cases as concern parts of the English Acts or orders which we have not adopted will of course not be noticed. The judgments will be in most cases given in full.

The statement of facts and arguments of counsel will be stated as concisely as is consistent with precision and clearness. It is confidently hoped that this new feature of the CANADA LAW JOURNAL will greatly enhance its value to the profession.

IT is too soon yet to speak of the working of the Judicature Act. The procedure of our two systems was rapidly tending towards fusion, and the profession were gradually being prepared for some such measure as the present; and it was felt, moreover, that it had to come to that sooner or later, but it cannot be said that there was any call from the country at the present time for the sweeping change that has been made. However, it is, perhaps, as well to have the agony over at once. There has, of course, been a period of dark uncertainty. This, however, could not well have been otherwise, even were the Act more perfect than it is. Those who have to initiate the administration of the law at Osgoode Hall are thoroughly competent for the task, and they will be assisted by an intelligent and industrious profession. There will, at first, be much worry and loss of time, but as practitioners resign themselves to the inevitable and knuckle down to their task, it is to be hoped that they may find the difficulties they dread fading away as they approach them.

SOMETHING will depend upon the rules of Court which, we understand, the Judges are engaged in preparing. It is reassuring in this connection to remember that the judges most recently appointed, Mr. Justice Osler and the Chancellor, were not long ago two of the best practitioners in their respective departments of law, and they possess in a marked degree the confidence of the Bar in matters connected with the subject in hand. In Mr. Dalton, on whom much also will depend, we have a gentleman of large experience, of liberal views, and who will not be afraid of grappling with difficulties. The consideration required in the preparation of these Rules has prevented the Judges completing the tariff which we understood was to have been promulgated last month. It will, however, be ready shortly. In the meantime the old tariffs will be in force, and will doubtless receive a construction which will make them as far as possible in accord with the changed practice.

THERE has been a great deal said (in fact, a great deal too much) in the leading daily papers as to the working of the new Act, and of the action of the judges in relation to it. On the one hand there was ample ground for Mr. Justice Cameron to object to act without the issue of a new commission. He was not alone in this view, and that there was some force in the contention, is evidenced by the fact that new commissions are being issued. On the other hand, it would seem true wisdom to make the best of an Act which doubtless has its share of faults, but is nevertheless the law of the land. Its faults can best be cured by an intelligent criticism of its provisions as points arise, so that the proper remedy may be applied by those who are responsible therefor.

That there has been want of care in the framing of the Act in some minor particulars is already apparent. Let us instance two cases that have arisen. Section 51 of the Act requires the Court seal to be attached to each filing in the offices of the

Deputy Clerk. This necessitates an additional stamp of fifty cents on each paper. This, of course, was never intended, but the Statutes are so plain that the Deputy Clerks have been instructed to insist upon the stamp being affixed in every case. We trust the judges will find or make some way out of the difficulty. At present this will add enormously to the costs of a suit—anything from say $5 to $25 or more.

Again, Rule 222 says that a party may obtain an order of course upon præcipe for discovery and production of documents. Form 125 is drafted on the assumption that an ordinary motion must be made before a judge in Chambers. The discrepancy was doubtless caused by following the English form without reference to the enacting clause.

WE notice reported in the London *Mail* for the 12th inst. an interesting case tried at the Assizes at Swansea, before Mr. Baron Pollock and a special jury. It is the case of *Elliott* v. *The Taff Vale Railway Company*, and is of importance as involving the question of the liability of railway companies for negligence in the management of their engines, whereby fires were caused in the vicinity of their lines. During the hearing reference was made to the cases of *Vaughan* v. *The Taff Vale Ry. Co.*, 29 L. J. Exch. 247: *Powell* v. *Fall*, 49 L. J. App. Q. B. 428: *Pigott* v. *Eastern Counties Ry. Co.*, 3 C. B. 299. The learned judge at the close of a long and elaborate summing up, left the following questions to the jury:—(1). Was the fire occasioned by any act of the defendants or their agents? (2). Did the sparks set fire to the plaintiff's premises immediately, or by setting fire to the grass outside? (3). Were the defendants guilty of negligence in the working and management of their engines and railway? The jury, after a short deliberation, returned the following answers: (1). The fire was occasioned by the act of the defendants. (2). The fire commenced in the plaintiff's premises and not outside. (3). The defendants were not guilty of negligence. A verdict was accordingly entered for the defendants, and judgment given for them.

NEW QUEEN'S COUNSEL.

The following is a list of the gentlemen who were recently appointed Queen's Counsel by the Dominion Executive:—

Richard Martin, Hamilton.
Samuel Smith McDonald, Windsor.
Hon. Alexander Morris, Toronto.
Allan R. Dougall, Belleville.
John Charles Rykert, St. Catharines.
John Creasor, Owen Sound.
Samuel Jonathan Lane, Owen Sound.
Thomas Wardlaw Taylor, Toronto.
George D'Arcy Boulton, Toronto.
Henry Burkett Beard, Woodstock.
Byron Moffat Britton, Kingston.
William Lount, Barrie.
William H. R. Allison, Picton.
Robert Smith, Stratford.
Hon. Wm. Macdougall, Ottawa.
James Kirkpatrick Kerr, Toronto.
Thomas Deacon, Pembroke.
Alexander Shaw, Walkerton.
George Dean Dickson, Belleville.
John McIntyre, Kingston.
Adam Hudspeth, Lindsay.
John Edward Rose, Toronto.
Charles Moss, Toronto.

Some few of these should have been appointed long since, and the reason for appointing some of the rest is not very plain, but on the whole the list has been accepted by the profession as satisfactory.

LEGISLATIVE PRECEDENTS.

McLAREN v. CALDWELL

It appears somewhat strange that in this pre-eminently "legislating" age, it should be hard to know where to go in order to lay one's hand on legislative precedents. We are not aware of any well-known practical treatise on legislation, in which can be found recorded a history of the course taken by various legislatures in special cases. For example, the public benefit may appear to require the passing of an Act which shall have a retroactive operation detrimental to vested rights. Where can a book be found which sets out the various kinds of retroactive acts which have been passed by various legislatures, and the circumstances of their passing?

The somewhat hackneyed subject of the legislation and judicial decisions in this Province on the subject of Rivers and Streams, affords an opportunity of illustrating what is meant. Some twenty years ago it was decided in the Court of Common Pleas, and subsequently confirmed by later decisions, that the clause in C. S. U. C. c. 48, which gives "all persons" the right to float saw-logs and timber down "all streams," only applies to rivers and streams which are naturally capable of being used for running timber, and not to those which have been rendered thus navigable by artificial improvements. On the faith of the law as thus declared (as it must be presumed), the owners of timber limits in different parts of the Province expended money in rendering various streams capable of being used for this purpose, expecting to be protected in the exclusive enjoyment and benefit of these improvements. Now, in 1881, the Court of Appeal gives judgment that the previous decisions promulgated an erroneous view of the law, and lumberers who have acted on the faith of the prior decisions find themselves in a false position. Members of the legislature might be supposed to desire to see how other legislatures, as for example, the English Parliament, had acted under similar circumstances.

What their desire was in this case it is not our proviuce to enquire, but we can refer them to at least one interesting precedent in point in the history of English legislation. It has reference to the history of special resignation bonds in England. The 31 Eliz., c. 6., enacted that if any patron of a living in England, for any corrupt consideration, by gift or promise, directly or indirectly, should present or collate any person to any ecclesiastical benefice or dignity, such presentation should be void, and the crown should present. It became, however, a common practice where a living became vacant during the minority of a son of a patron intended for the church, for the patron to present a clergyman, who executed a bond conditioned in a penal sum to resign when the patron's son should be of age to hold the preferment. And in *Johnes* v. *Lawrence*, Cro. Jac. 248, it was decided that these special resignation bonds did not offend against the provisions of the statute of Elizabeth. Many years afterwards, however, namely in 1826, a decision was come to by the House of Lords in the case of *Fletcher* v. *Lord Sondes*, 3 Bing. 501, which overturned the decisions which had previously taken place in favour of such special resignation bonds. "But," says Mr. J. W. Smith, in his work on contracts, "as the consequences of this would have been exceedingly hard upon persons who had executed special resignation bonds at the time when they were looked upon as legal," the Archbishop of Canterbury immediately brought in a bill, which afterwards passed into law. It is the 7–8 Geo. IV., c. 25, which confirms special resignation bonds, if made before April 9th, 1827, the day of the decision in *Fletcher* v. *Lord Sondes*, a course, it may be observed, the very reverse of that pursued by the Ontario Legislature in the late session.

The history again of one of the English Factors' Acts, affords a precedent of interest in connection with recent events in this Province. In *Johnson* v. *Credit Lyonnais* Co., L. R. 2 C. P D., 224, 3 C. P. D. (C. A.) 32, one Hoffmann, a broker in the tobacco trade and also an importer of tobacco, imported a quantity of that article, and left it in bond in certain warehouses, receiving the usual dock warrants, and the tobacco was entered in the books of the Company in Hoffmann's name. This tobacco Hoffmann sold to the plaintiff, but the plaintiff not finding it convenient to take it out of bond, left it in bond in Hoffmann's name, and the warrant in Hoffmann's hands, and took no steps to have any change made on the books of the Dock Company as to the ownership of the goods. Being thus ostensible owner, Hoffmann fraudulently obtained advances on the pledge of a portion of it from the Credit Lyonnais Co., the defendants, who acted in good faith. Denman J. gave judgment for the plaintiff for the value of the tobacco pledged to the defendants. The case went to appeal. After, however, the decision of Denman J., and it appears owing chiefly to that decision, but before the appeal the Imp. 40–41 Vict., c. 39, was passed, sec. 3 of which altered the law as determined by Denman J. in the above case, but sec. 6 specially declared that:—"This Act shall apply only to acts done and rights acquired *after the passing of this Act*:" and the Court of Appeal subsequently confirmed the decision of Denman J., in the case referred to.

It is superflous to point out how different was the course pursued in a similar case by the Ontario Legislature in the last session. There, while *McLaren* v. *Caldwell* was before the Courts, and on its way to the Court of Appeal, the Legislature proposed to alter the law in accordance with which it was decided in the Court below, and so deliberately to take the case out of the hands of the proper arbiters by a despotic act of legislative power. As our readers are aware this Act was disallowed by the Governor in Council.

THE ACTS OF LAST SESSION.

ONTARIO: 44th VICT.

A concise summary of such of the Provincial enactments of last session as are of special importance to the practical lawyer may be of some use and may direct attention to points which might otherwise be overlooked in the hurry of business.

Passing by chap. 2, which introduces some slight amendments into the Act respecting the sale and management of Timber on Public Lands (R. S. O., c. 26),—chap. 3. which amends the Act respecting the expenditure of Public Money for Drainage Works (R. S. O., c. 33), chap. 4, which amends the Act respecting the Assessment of Property (R. S. O., c. 180), and also the Act respecting the Registration of Births, Marriages and Deaths (R. S. O., c. 36), chap. 5, which compromises the Judicature Act,—and chap. 6, which amends the Jurors' Act of 1879 (42 Vict. c. 14),—the first Act which demands special attention is chapter 7, entitled an Act respecting Interpleader. Section 4 provides that this Act is to be read with and form part of the Act respecting Interpleading, R. S. O., c. 54. It will be remembered that sec. 22 of that Act provides that in case any claim is made to any goods taken under an attachment or execution, under process issued out of any County Court, al the proceedings under the Act shall be taken in the County Court of the County in which such goods were so taken, or before the judge thereof; or such Court or Judge may on the return of the rule or order, should it be deemed proper, order the said proceedings to be taken in the County Court from which such process issued, or before the judge thereof. The Act of last session provides (sec. 1) that when the amount claimed under an execution or attachment issued out of one of the Superior Courts of law does not exceed $400, exclusive of interest and sheriff's costs, or when the goods seized are not deemed to be of a greater value than

$400, the order directing an issue may direct that it be tried in the County Court of the County in which it would be tried under the said sec. 22 of R. S. O., c. 54: and thereupon it shall be tried and all subsequent proceedings shall be had in the County Court, which shall have as full jurisdiction as though the writ of execution or attachment issued out of a County Court.

The next Act, chap. 8, regulates the fees of certain officers and others, making, amongst other changes, certain alterations in the fees payable to County Court clerks under the Act respecting mortgages and the sales of personal property (R. S. O., c. 119). Chapter 9 is of a private nature, being an Act to make provision for the administration of justice in the County of Dufferin. The next Act, however, chap. 10, calls for more special attention. It is an Act to amend sec. 69 of the Act respecting the Registration of Instruments relating to Lands: (R. S. O., c. 111). Sec. 69 of R. S. O., c. 111, provides that where a married woman is a mortgagee, or the assignee of a mortgage, the certificate of discharge for registration must, if given after the passing of that Act, be executed jointly by the married woman or her husband, or pursuant to "The Married Woman's Real Estate Act" (R. S. O., c. 127). The ambiguity attaching to conveyances by married women under the Revised Statutes is well known, and attention has been called thereto by Messrs Leith and Smith in their recent edition of Blackstone. Any difficulty, however, resulting therefrom in connection with the above section of the Registry Act, is removed by the Act of last session, which expunges the clause relating to the mode of execution of such certificates of discharge, and enacts that it shall not be necessary to their validity that the husband be a party, or execute; and that any discharge of mortgage heretofore executed by a married woman alone (and duly registered) shall be as effectual as if executed by husband and wife conjointly.

The next Act, chap. 11, is the now notorious Act for Protecting the Public Interest in Rivers, Streams and Creeks, which has been already commented on in this Journal, and which, having been disallowed, need not be further noticed. Chap. 12 introduces a fresh amendment of the much amended Act respecting Mortgages and Sales of Personal Property (R. S. O., c. 119). It will be remembered that sec. 10 of the Revised Statute, which provides for the periodical renewal of mortgages of chattels, was repealed by the 43 Vict. c. 15, sec. 2, which substituted a new section in its place. This new section provides that every mortgage, though duly filed, shall cease to be valid as against creditors and *bonâ fide* purchasers for value after the lapse of one year, unless within thirty days next preceding the completion of that period a statement exhibiting the interest of the mortgagee, or his representatives, and the amount due for principal and interest and all payments made, is again filed in the office of the clerk of the County Court of the county wherein the goods mortgaged are then situate, with an affidavit of the mortgagee or assignee or of his agent duly authorized in writing (a copy of which authority shall be filed) that such statement is true, and that the said mortgage has not been kept on foot for any fraudulent purpose. The Act of last session now makes an additional provision, viz., that another statement in accordance with the said 43 Vict., c. 15, sec. 2, duly verified as required by that section, shall be similarly filed within thirty days next preceding the expiration of a year from the day of filing the first statement, or else such mortgage shall cease to be valid against creditors and *bonâ fide* purchasers for value,—and so on from year to year: thus apparently giving legislative sanction to the principle under which in *Kissock* v. *Jarvis*, 9 C. P., 156, it was decided that a mortgagee, to retain his priority, must under 12 Vict., c. 74, continue to refile his mortgage after the first refiling at the end of the first year.

Chap. 13 introduces a small amendment into sec. 11, of the Act respecting the registration of co-partnerships and business firms (R. S. O., c. 123.) That section provides that "*every member of any partnership*" who fails to comply with the requirements of the Act shall forfeit a penalty of $100. The Act of last session inserts after the word "partnership,"—the words "or other person required to register a declaration under the provisions of this Act."

Chapter 14 is entitled an Act to further provide for the Release of Dower of Married Women in certain cases, and supplements and interprets certain sections of the Act respecting dower (R. S. O., c. 126). Sec. 1 of the new Act empowers an owner of land to apply for a Judge's order enabling him to *mortgage* his land free from dower, notwithstanding the dissent of his wife, where his wife has been living apart from him for two years under such circumstances as by law disentitled her to alimony, and thus this section extends the provisions of R. S. O., c 126, sec. 10., as added to by 41 Vict., c. 8, sec. 13, to the case of mortgages as well as sales. But it may be worth while to remark that there does not appear anything in the Act of last session extending to mortgages *mutatis mutandis* the amendment introduced into R. S. O., c. 126, sec. 10, by 43 Vict., c. 14, sec. 4., viz: that the said section shall apply to any case in which an agreement for sale had been made, a conveyance executed by the husband before the passing of the Act and part of the purchase money retained by the purchaser on account of dower, or an indemnity given against such dower.

Sec. 2 of chapter 14 enlarges the powers given to a Judge under R. S. O., c. 126, secs. 8 and 9, of making an order barring dower on the sale of land, notwithstanding non-concurrence of the wife, in cases where she is of unsound mind and confined in an asylum, by extending a similar power to cases where, though not so confined, the gaol surgeon of the district where she resides, and another medical man to be named by the Judge, duly certify that they have personally examined such married woman and believe her to be insane, and where the said Judge certifies to the same effect. There appears, however, to be this difference, that where the application is made to a County Court Judge, under R. S. O., c. 126, secs. 8, 9, it is to be made to the Judge of the county where the owner of the land resides, whereas, applications under sec. 2 of the Act of last session are in such cases to be made to the Judge of the County Court where the woman resides. There is also a further restriction, viz., that the examination and certificates, in cases under the said section, must be made and granted within one calendar month, and the application must be made within one month of the day upon which the last of such examinations took place.

Sec. 3 then goes on to extend sec. 2 and R. S. O., c. 126, sec. 8, so as to make them apply to mortgages as well as sales. Sec. 4 provides for subsequent orders of the same kind as those authorized by R. S. O., c. 126, sec. 8, 9, and by secs. 2, 3 of the Act under review, and provides that the Judge may afterwards make orders in respect of other sales or mortgages on the like evidence, or on any other evidence which may satisfy him, of the continued insanity of the married woman. Sec. 5, then, does for this Act, and for R. S. O., c. 126, sec. 10, what 43 Vict. c. 14, sec. 4, does for R. S. O., c. 126, sec. 9, viz., extends their application to any case where any person owns or has the right to sell or mortgage (whether as trustee or otherwise) land which is subject to the dower of a lunatic, whether such dower is inchoate or complete, and whether the person applying is or is not the husband of the lunatic. Sec. 6 and last then provides, as does R. S. O., c. 126, sec. 10, that secs. 6, 7, 8 and 10 of the Married Woman's Real Estate Act, (R. S. O., c. 127), shall apply to orders made under this Act.

It will thus be seen that the principal effect

of chap. 14 of the Acts of last session is to extend the cases in which, under R. S. O., c. 126, orders may be made barring dower, notwithstanding the non-concurrence of the doweress, to mortgages as well as sales.

Chap. 15 repeals sec. 15 of the Act to secure to wives and children the benefit of assurances on the lives of their husbands and parents, and substitutes a new section for it. This new section enables not only any person who effects a policy under the Act, *but also any person who has or may duly declare a policy effected on his life to be for the benefit of his wife or children*, to require the assurance company not only, as before, to apply the bonus or profits accruing in reduction of the premiums, or to add them to the policy, but also *to pay them, or portions of them, to the insured.* And sec. 2 enacts that the Act shall apply retrospectively as well as to future policies.

Chap. 16 virtually extends the Act respecting guardians of infants (R. S. O., c. 132) to cases where the father is living, by providing that the Surrogate Court may appoint the father of the infant to be his guardian; or may, with the father's consent, appoint some other person or persons to be the guardian or guardians of such infant: but (sec. 3) if the infant is over fourteen years of age his consent is needed.

Chap. 17 is of great interest to the profession, since it defines the powers of the Law Society in reference to matters of discipline, conferred upon it in the persons of the Benchers by R. S. O., c. 138, secs. 38 and 41. This it does by definitely enabling the Benchers to disbar, expel, or refuse to admit any barrister, solicitor, student or articled clerk found "guilty of professional misconduct, or of conduct unbecoming a barrister, attorney, solicitor, student-at-law, or articled clerk," after due inquiry by a committee of their number or otherwise.

Chap. 18 is an Act to extend the powers of companies incorporated under the Joint Stock Companies' Letters Patent Act (R. S. O., c. 150), and is to be read as part of that Act. The effect of sec. 1 is to extend the power of increasing the capital stock given to directors by R. S. O., c. 150, sec. 16 (which is by sec. 6 repealed), inasmuch as it is no longer necessary before this can be done that the whole capital stock of the company shall have been taken up, and fifty per cent. thereon paid in; but it is under the new enactment sufficient if nine-tenths of the capital stock has been taken up, and ten per centum thereon paid in. Under sec. 2 the name of the Province of Ontario, or of some locality therein, is to constitute part of the name of every company incorporated under the Act. By sec. 3 the Lieutenant-Governor in Council may, in pursuance of a resolution passed by a two-thirds vote, issue supplementary letters patent embracing all or any of the following matters :—

(1) Extending the powers of the company to any objects, within the scope of the said Act, which the company may desire;

(2) Limiting or increasing the amount which the company may borrow upon debentures or otherwise;

(3) Providing for the formation of a reserve fund;

(4) Varying any provision contained in the letters patent, so long as the alteration desired is not contrary to the provisions of the said Act;

(5) Making provision for any other matter or thing in respect of which provision might have been made by the original letters patent.

The next Act, chap. 19, is one for the incorporation by letters patent and the regulation of Timber Slide Companies. This Act works great havoc with the Act respecting Joint Stock Companies for the transmission of timber (R. S. O., c. 153), since, besides various amendments, it repeals (sec. 28) the first twenty-six sections, and also sections twenty-nine to forty inclusive of that Act. By sec. 3 it provides that every company incorporated under its provision shall be sub-

ject to the provisions of the said R. S. O., c. 153, as so amended.

Of the next Act, chap. 20, we need say little. It is entitled an Act to give increased stability to Mutual Fire Insurance Companies, and (sec. 29) is to be read as part of the Act respecting Mutual Fire Insurance Companies (R. S. O., c. 161) into which it introduces several amendments. Among these there appears a curious one introduced by sec. 27, which amends R. S. O., c. 161, sec. 61. This last-named section, it will be remembered, provides that no execution shall issue against the Company upon any judgment until after the expiration of three months from the recovery thereof. This is now amended by excepting any judgment recovered on any policy or undertaking of the company *heretofore issued or given* where more than fifty per cent. of the premium was paid in cash at the time of the insurance: and a judge or referee in chambers is, on application, to certify as to these facts. This then, will only apply to policies issued before R. S. O., c. 161. (36 Vict. c. 44). Sec. 28 makes the provisions of the Fire Insurance Policy Act (R. S. O., c. 162) apply to mutual fire insurance companies.

Chap 21, entitled an Act respecting returns from Incorporated Companies, is, if we are not mistaken, intended to prevent the recurrence of such a scrape as certain companies incorporated by letters patent under R. S. O., c. 150, got into some time ago, by not duly making the yearly returns required by sec. 49 of that Act. Under subs. 6. of the said sec. 49, any company making default is liable to a penalty of twenty dollars per day during the continuance thereof, and so is every director, manager, and secretary. As under the authorities such penalty would probably be held to be accumulative, defaulting companies were apt to find themselves saddled with very heavy liabilities. Now, however, by virtue of sec. 2 of the Acts of last session, the whole amount of the penalty recovered is not to exceed $1000, and if several actions are brought against the company or its officers the court or judge may consolidate, or stay the later of them as seems just.

Chapter 22, entitled an Act to make provision for the safety of railway employees and the public, calls for little notice here, though it is of interest in these days when we hear so much of proposed alterations in the law affecting the liability of masters for injuries sustained by servants in their employ. This Act would appear to deprive railway companies, wilfully neglecting to comply with its provisions, of any defence on the ground that the injured servant of his own will incurred the risk.

Passing by chapter 23, which is an Act respecting aid to certain railways, chap. 24, entitled the Municipal Amendment Act of 1881, is to be read as part of the municipal Act (R. S. O., c. 174), and introduces a great number of amendments into that Act. It may be worth while to notice here that under sec. 35 no municipality shall sell or lease its market fee for a period beyond April 1, 1882, till further authorized. In like manner chap. 25, the Assessment Amendment Act 1881, contains, with new enactments, several amendments of the Assessment Act (R. S. O., c. 180). Of the remaining public Acts it will be sufficient to mention the titles. Chap. 26 is an Act respecting snow fences; chap. 27 is an Act to give increased efficiency to the laws against illicit liquor selling, which it does partly by a variety of amendments to the Liquor Licence Act (R. S. O., c. 181); chap. 28 is an Act to prevent the spread of yellows among certain trees; chap. 29 is more interesting to small birds than to lawyers, and amends the Act for the protection of insectivorous birds (R. S. O., c. 201); and lastly, chap. 30 is an Act for further improving the School Law, small boys being attended to after small birds.

All the remaining Acts of last session are of a private character, except chap. 33, which repeals secs. 23 and 24 of the Prison and

Asylum Inspection Act (R. S. O., c. 224) One of these private Acts is of more than usual interest, viz., the Act to amend the Acts incorporating the Toronto Gravel Road and Concrete Company. In this Act, the legislature again interferes with vested rights, and in a manner that practically works a great injustice, but in one respect they show more tenderness than was shown in the case of the Rivers and Streams Act, and sec. 2 is a provision very different to anything contained in the latter Act, inasmuch as it provides that "nothing in this Act contained shall prejudice or affect the rights or contention of either the said Corporation of the County of York or the said company in a certain cause now pending . . . and the matters in the said cause shall be disposed of and determined as if this Act had not been passed."

This completes our review of the acts of the local legislature passed during the last session. We hope speedily to supply our readers with a similar practical review of the Acts and orders in council contained in the latest volume of Dominion Statutes.

SELECTIONS.

INEQUALITY OF SENTENCES.

Sir Watkin Williams, on the 6th inst., presided at an eisteddfod held at Allt Ddu, near Pwllheli. Responding to an address presented to him, he said:—The administration of the criminal law I approached with horror and with dread. Our criminal code has been, and still is, the most severe and sanguinary in all Europe; and a large number of the English people seem to me to be ferocious by nature and to have a very imperfect idea of the only true and legitimate object of punishment; and, while they cry for vengeance, they are infuriated by the moderation and humanity of the most just and experienced of the judges. Lord Campbell, in his autobiography, recording his feelings upon approaching an assize town, remarks that the wretched prisoners awaiting the dreaded presence of the judge little dream how much more the judge often dreads the ordeal than they do. When I see these unhappy creatures, and think over what may have been their infancy and their childhood, and their early associations, and the utter absence of all chance of forming good habits and cultivating happy instincts, they seem to me far more objects of compassion and pity than of vengeance and hatred, and I tremble to think by what an accident of accidents our positions are not reversed. At the same time, our social system, if it is to exist in anything like a civilized form, must be protected, and crime must be punished as a deterrent against repetition, and the criminals must, if possible, be reclaimed. But vengeance is not ours, and to indulge in it is mere savagery and ferocity. I am bound, however, to say that I sympathize to a large extent with the wonder and perplexity in the public mind caused by what strikes them as the inequality and uncertainty of sentences. To a certain extent this inequality is no doubt real. So long as judges have different ideas respecting degrees of criminality and of punishment this must be so; but to a still larger and by far the larger extent their inequality is apparent only, and quite unreal. In the case of most crimes there is great latitude of punishment sanctioned by the law, because there is the greatest diversity and inequality in the possible degrees of criminality; a burglary may be a most alarming and atrocious crime committed by a professional housebreaker or it may be in substance a trivial petty theft; a manslaughter may present features exceeding in villainy and cruelty many murders, or it may be little more than a common assault; and the intermediate degrees between these are infinite. The knowledge of the public is derived from the reports in the public press, and in the vast majority of cases, as I am informed by the most experienced of the judges, it is absolutely impossible to obtain from these reports a faithful or adequate picture of all the features of the case. None but the most skilful of reporters with adequate space at his command can present a true and faithful representation, disclosing the essential points in just perspective with the real lights and shades and colour belonging to the true picture; when the reporter is careless, unskilful, or unfaithful, of course, the case is hopeless, and it is further undoubted fact many repor-

ters form their own theory of a case and in their short abstract unconsciously give undue prominence and weight to those points which tend to support their theory. One of the most experienced of the judges informed me that it was a common experience for him to notice in the reports of cases that facts which he regarded as of great consequence as bearing upon the degree of criminality were wholly unnoticed, whilst others were brought into false and unnatural light. What wonder, then, that the public mind is astonished and perplexed at the inequality of sentences? The subject is one of vast and far-reaching consequence and one well worthy the attention of public men; but if the people wish fairly to judge the judges, they must be careful first to see that they have a true and faithful picture of their actions.—*Irish Law Times.*

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COMMON LAW CHAMBERS.

Wilson, C. J.]

IN RE JOHNSON V. THE TORONTO, GREY AND BRUCE RAILWAY COMPANY.

Mandamus—Railway bonds—Registration.

The Canadian Bank of Commerce received from various parties bonds of the Toronto, Grey and Bruce Railway to the amount of £106,800, and tendered them for registration at the Railway office in order that the holders might vote thereon. The Secretary of the Railway Company refused to register the bonds unless written transfers from the original holders were produced.

Held, that the Company should register the bonds without the production of the transfers, and the summons for a *mandamus* was made absolute with costs.

McCarthy, Q.C., and *E. Martin*, Q.C., for the applicants.

S. H. Blake, Q.C., showed cause.

Osler, J.] [August 5.

IN RE KINSEY V. ROCHE.

Division Court—Prohibition—Surety—Division Courts Act, 1880.

Plaintiff and defendant were joint makers of a promissory note for $169, which plaintiff signed as a surety only. Plaintiff paid $118 upon it.

Held, that plaintiff could not maintain an action in a Division Court for the amount so paid and that a prohibition must issue, but without costs, as there was no meritorious defence.

Watson & Doherty, for defendant.

Bethune, Moss, Falconbridge & Hoyles, contra.

Osler, J.] [August 26.

GRIERSON V. CORBETT.

Bail—Ca. sa. to fix bail—Surrender—Bail-piece—Copy of.

Where a defendant is arrested by a sheriff under a *ca. re.*, and after verdict is surrendered by his bail to the same sheriff, upon an action being commenced against them, the sheriff is not entitled to a copy of the bail-piece before receiving the prisoner into custody, and such refusal being given, the sheriff was compelled to pay the costs of an application to stay proceedings, and an order was made to extend the time for surrender.

Aylesworth, for the bail.

Robinson, O'Brien & Scott, contra.

The name of *E. Martin*, Q. C., should have appeared as one of the Counsel for the applicant in *Re Osler & T. G. & B. R. R. Co.* (ante p. 305) instead of that of *Osler*, Q. C.

REPORTS.

RECENT ENGLISH PRACTICE CASES.

Collected and prepared from the various Law Reports by A. H. F. LEFROY, ESQ *)

CHATTERTON v. WATNEY.

Imp. O. 45, *rr.* 3, 4, 8.—*Ont. O.* 41. *rr.* 6, 7, 11.

A garnishee order under the above general orders binds the debt attached, but does not amount to a transfer of them with securities.

[March 30, L. R. 17 C. D. 259.

M. mortgaged leasehold to W. and then to B. A., judgment creditor of B., obtained a garnishee order against M. After this W. sold the property under a power of sale, and an action was brought to distribute the surplus proceeds.

Held, by the Court of Appeal (affirming a decision of Bacon, V. C., 16 Ch. Div. 378,) that the judgment creditor had no claim against the surplus proceeds of sale, for that a garnishee order has not the effect of transferring the debt due from the garnishee with the benefit of the securities for it, and that to treat the garnishee order as affecting the land before execution would conflict with the provisions of Imp. 27 and 28 Vict. c. 112, (which statute enacts that no judgment shall affect any land until delivered in execution.)

JESSEL, M. R.—"The case turns firstly on order 45 of the rules embodied in the Judicature Act 1875. Rule 3 of that order provides that, 'service of an order that debts due or accruing to the judgment debtor shall be attached or notice thereof to the garnishee in such manner as the Court or Judge shall direct, shall bind such debts in his hands.' The 4th Rule empowers the Court, where the garnishee does not dispute the debt due from him, or does not appear, to issue execution to levy the amount due from the garnishee. The effect is to declare the debt bound and to make the garnishee liable to execution. . . . The appellant contends that a garnishee order is a sort of transfer of the debt and the security for it. That would defeat the provision in the 27-28 Vict. c. 112, by making the order affect land without any delivery in execution. This Act was passed for the purpose of facilitating the sale of land and not for the benefit of creditors. B. had an interest in the land, and equitable execution could have been obtained against him but this has not been done. Though the appellant as between him and B. is entitled to have the debt paid to him, he has no interest in the mortgaged premises. He has no title, and the appeal must be dismissed."

BRETT, L. J.—"I am of the same opinion. The argument of the appellant went on the ground that by the garnishee order the debt is transferred, and he referred to the language of James, L. J., in *Ex parte Joselyne*, 8 Ch. D. 327, as supporting this view. But the Judicature Act contains no words importing a transfer of the debt, and I think that the L. Justice when he said that the property in the debt was transferred was only using a colloquial expression which meant nothing more than that the debt was bound. I am of opinion that the appellant's case fails."

COTTON, L. J.—"I am of the same opinion, and should be content to rest the case on order 45 alone. If that gives the judgment creditor no interest in the land, it is unnecessary to consider the other Act of Parliament referred to by the M. R. though that Act strongly supports the conclusion at which we have arrived. . . . . There is nothing in the terms of the general order to affect any security for the debt, it only takes away the right of the judgment debtor to receive the money and gives the judgment creditor a right to receive it. It has not the effect of transferring the security, nor does it give the person who obtained the garnishee order any right to the security or any claim against the land comprised in it."

JESSEL, M. R.—"I quite agree with the view of Cotton, L. J., that a garnishee order does not operate as a transfer of the debt."

[*Note.—Ont. O.* 41, *rr.* 6. 7. 11, *are identical with Imp. O.* 45. *rr.* 3, 4, 8, *respectively.*]

*It is the purpose of the compiler of the above collection to give to the readers of this Journal a *complete* series of all the English practice cases which illustrate our present practice, reported subsequently to the annotated editions of the Ontario Judicature Act, that is to say since June, 1881.

Recent English Practice Cases.

Dauvillier v. Myers.

Imp. O. 31 r.r. 11, 18, 20; O. 36 r. 32.—Ont. O. 27, r. 3, 16, 18; O. 31, r. 25.

The official referees have no jurisdiction to make an order for the production of documents, the proper course being to take out a summons for the purpose in the chambers of the Judge, to whom the action is attached.

[April 13. L. R. 17 Ch. D. 346.

This action had been referred to one of the official referees who during the trial had ordered the plaintiff to produce certain documents at the office of his solicitor for the defendant's inspection.

With this order the plaintiff had not complied, and the defendant now moved, under Imp. O. 31, r. 20 of Rules of Court 1875, (Ont. O. 27, r. 18), to dismiss the action.

Counsel in support of the motion asked that if the order of the official referee was wrong, the order for production might be made then, and that if necessary they should have leave to amend their notice of motion.

Jessel, M. R.—I shall make the order for production as asked for, and shall for that purpose give the plaintiff leave to amend his notice of motion, though it is not absolutely necessary, as the notice of motion contains the usual clause as to further or other order. The official referee has made a slip; he made a perfectly proper order if he had jurisdiction to make it, but under Order 36, r. 32, (Ont. 31, r. 25), the only jurisdiction he has is to make such an order as a Judge of the High Court can make at a trial before him, and the order the official referee has made could not be made at the trial. Orders for the production of documents should always be made in the chambers of the Judge to whom the action belongs. My chief clerk would have made the order as a matter of course.

I shall now make the order that the plaintiff do produce the documents in question at the office of his solicitor, for the defendant's inspection. The costs of this motion will be costs in the action.

[*Note.—The Imperial and Ontario Orders referred to are virtually identical, but under our O. 27 r. 3, an order for discovery and production can be obtained on præcipe.*]

Ex parte Hospital of St. Katharine.

Imp. O. 55.—Ont. O. 50. r. 1.

The Court has now, under the Judicature Act, 1875, and Order 55 of Rules of Court, 1875 (Ont. O. 50, r. 1), a discretion as to directing payment of costs where a provision as to costs is omitted in any public or private act.

[Feb. 11, L. R. 17 Ch. D. 378.

This was a petition by the Master of the Hospital of St. Katharine, that part of a sum of money which had been paid into court by the St. Katharine Docks Company upon the purchase of land from the charity might be ordered to be laid out in the redemption of land tax chargeable in respect of land belonging to the charity; and the petition asked that the Docks Company might be ordered to pay the costs of the petition and of the re-investment of the money. The payment of costs was resisted by the company on the ground that by their private Act of Parliament, 6 Geo. IV., the Court could only direct costs to be paid in case the money was re-invested in the purchase of "other houses, buildings, lands, tenements, or hereditaments," and not where money was re-invested in the redemption of land tax.

After this point had been decided adversely to the contention of the company, who were ordered to pay the costs,

Glasse, Q. C., referred his Lordship to a recent case of *Ex parte Mercers' Company*, L. R. 10 Ch. D. 481, where it was held by the M. R. to be now immaterial to consider whether any public or private statute passed prior to the Jud. Act. 1875, had made, or omitted to make, any express provision as to the costs of particular proceedings under such statute, inasmuch as the combined effect of the Jud. Act and Order 55 of Rules of Court, 1875, giving the Judges a discretion as to costs in all cases, with certain specified exceptions, was to repeal all previous enactments directing costs to follow certain rules; and where a previous statute is silent as to the costs of particular proceedings under it, to supply the omission.

Malins, V.C.—"I am glad to have been referred to that case, because it settled the question, and shews that, independently of the term of this Act, the Court has authority to do what I have now done."

[*Note.—Imp. O. 55 and Ont. O. 50; r. 1 are identical.*]

ONTARIO.

IN THE FOURTH DIVISION COURT OF THE COUNTY OF SIMCOE.

PATTERSON, *Primary Creditor;* RICHMOND, *Primary Debtor;* and STEPHENS, *Garnishee.*

Garnishing rent—Apportionment.

Rent accruing due by virtue of the Apportionment Act, R. S. O., cap. 136, secs. 2, 3, may be attached, and when due may be ordered to be paid to satisfy the primary debt.

[Barrie, June 21. 1881.

This was a garnishee summons before judgment, the claim being founded on a promissory note for $96 and interest. The primary debtor disputed the claim on the ground of failure of consideration, and further alleged that the money sought to be garnished was not attachable, in that it was rent not yet due. The case came on for trial, and after taking time to consider, the following judgment was given by ARDAGH, J. J. :—It is adjudged that the primary creditor do recover against the garnishee the sum of $88.25.

The contention of the primary creditor must be allowed. The reason why rent formerly could not be garnished was that it might never become due, and so it would be unfair to order the tenant to pay to a third person what his landlord might never have been able to collect from him. The protection of the tenant was what was aimed at, and he ought to be satisfied if he gets that protection without endeavouring to "protect" his landlord against his (the landlord's) creditors. In this case there was no reason why the tenant should not have held, subject to the decision of the Court, the rent which became due a week after the attaching order was served, and some six or seven weeks before the sitting of the Court. He cannot now say that the rent never did become due, or that anything happened to prevent his becoming liable to his landlord for the rent then just about to become due. The "warning" in the summons served on him was that "all debts due or accruing, due" from him to his landlord were attached, &c. Now the statute (R. S. O., cap. 136) has made this rent to be "accruing due," and nothing ever happened to prevent it becoming actually *due.* All that a tenant in such a case could ask is, that he should not be ordered to pay before the rent became actually due. The grounds upon which the Courts refused to allow rents to be garnisheed are wanting in this case. This, coupled with the statute in question, and also with the fact that the tenant cannot be injured in any way, and also that it *should not* be his interest to see his landlord's creditors defeated, all concur in rendering it necessary and just that an order should now be made to pay over so much of the rent as will satisfy the primary creditor's claim.

Gamon, for the primary debtor and garnishee, subsequently applied for a new trial, contending that the debt to be garnished must be a debt actually due and owing at the date of summons to such a debt as the primary debtor could sue for at that time. The cases of *McLaren* v. *Sudworth*, 4 U.C. L. J., 233, and *Com. Bank* v. *Jarvis*, 5 U. C. L. J. 66, were, it was submitted, as much in point now as since the Apportionment Act (R. S. O., Cap. 136, sec. 2, &c.), the latter being solely for the equitable relief of heirs, devisees and legatees, and that in fact the doctrine of apportionment does not apply to a rent, except in cases of death, accident, or sudden termination of the lease, in cases where there is no adequate remedy at common law. Story Eq. Juris., pp. 474 to 484. Admitting, however, that rent is apportionable, it is not a debt until due and payable (sec. 3, R. S. O., cap. 136), consequently it could not be recovered as a debt at the time of the issue of garnishee summons.

There must be what there is not here, a legal debt due by a legal debtor. See *Boyd* v. *Haynes*, 5 Prac. R. 15; *Mead* v. *Creary*, 8 Prac. R. 382; *Holland* v. *Wallace*, Ib. 186.

Robertson, for the primary creditor, showed cause.

ARDAGH, J. J.:—I cannot say that the cases quoted by the garnishee have altered my opinion. The law as to garnishment of rent very often worked justice to creditors, and I see no reason they should not, since the Act respecting apportionment, have the same rights, at least in a case like this, as in respect to other debts. Here the garnishee has no objection to the order made as he has submitted himself to the judgment of the Court and paid the money into Court.

LAW STUDENTS' DEPARTMENT.

RECENT EXAMINATIONS.

The following is the result of the recent examinations for admission and call:—

Attorneys—J. H. M. Campbell, G. G. Mills, J. Williams, C. Bitzer (without an oral on the merits), A. Ford, W. E. Macara, J. W. Curry, J. S. McBeth, H. Yale, C. Millor, A. Dawson, C. C. Going, A. H. F. Lefroy, G. M. Lee, Jas. Scott, E. N. Lewis, S. Wood, D. K. Cunningham, G. W. Baker, G. Beavers, F. H. Thompson (æq.), B. E. Sparnham, W. H. Bennett, C. E. Carbett, A. McKay.

Barristers—J. H. M. Campbell (with honours and gold medal), G. A. Watson (without oral on merits), J. S. McBeth, H. E. Crawford (æq.), J. R. Lovell, G. G. Mills, J. A. McCarthy, Chas. Millor, A. McNabb, J. Scott, C. Bitzer, W. E. Macara (æq.), S. G. McKay, J. B. O'Brian, F. H. Thompson, F. W. Kittermaster, A. Ford, J. W. Curry, E. N. Lewis, F. Case, A. R. Duncombe, N. Gilbert, W. F. Morphy.

Six of those who went up for examination as Attorneys, and seven of those who went up for call, were rejected.

The Second Intermediate Scholarships were awarded as follows:

A. Mills, P. S. Carroll, and G. Davis.

Thirty-six students presented themselves for examination in the Second Intermediate, of whom thirty-two passed. Of the thirty-two who went up in the First Intermediate only twenty passed.

EXAMINATION QUESTIONS.

A law student writes us as follows:—

"Kindly continue the publication of the questions and answers taken from the English *Bar Examination Journal*."

We are glad to find that the extracts have been found useful, and gladly continue them:

Q.—3. Explain the nature and objects of a conveyance by lease and release. To what extent did such conveyances operate under the Statute of Uses?

A.—This consisted of two deeds. By the first the releasor bargained and sold the land to the releasee for a year for a sum of money expressed to be paid at the time. By the second the releasor released the reversion to the releasee. The object was to enable an estate of freehold to he conveyed without the trouble of a feoffment, or an entry by the grantee. It operated under the Statute of Uses to this extent: that before that statute the Court of Chancery held that whenever A. bargained and sold land to B. for any estate for a pecuniary consideration, A. thereby became seised to the use of B. for such estate until a legal conveyance was made of it. The Statute of Uses then had the effect of making such a bargain and sale a legal conveyance itself. Hence by this means a legal term could be conferred without entry by the lessee, and the reversion could then be released to him. The Statute of Uses indeed elevated a bargain and sale of a freehold estate into a legal conveyance; but a subsequent statute (27 Hen. 8, c. 16), required all bargains and sales of estates of freehold to be made by deed enrolled. (Wms. R. P. Pt. I. c. 9.)

Q.—5. Explain the nature of the "reasonable and probable cause" which will prevent an action for malicious prosecution from being maintained. Is the existence of such cause a question of law or of fact?

A.—Whether the defendant had "reasonable and probable cause" for instituting the prosecution in respect of which the action is brought, is a question of opinion depending entirely on the view that may be taken by the judge of the circumstances of the case. The plaintiff must show that there was no reasonable or probable cause for the prosecution by giving evidence of facts from which the absence of such cause may be inferred; and evidence of malice on the part of the defendant will not be sufficient, because a person actuated by malice may nevertheless have a good reason for prosecution.

The existence of reasonable and probable cause is a question of law for the judge, the jury having previously ascertained the facts. (Underhill on Torts, 2nd ed. 101 ; Indermaur, C. L. 2nd ed. 309.)

Q.—6. Explain the application of the maxim respondent superior in an action for injury arising through the neligence of (1) the defendant's coachman driving a hired horse and carriage; (2) the servants of a sub-contractor who has contracted with the defendant to do a portion of the work which the defendant himself has undertaken to do.

A.—(1) As a master is liable for the torts of his servant, committed by the latter while acting within the scope of his employment, and the coachman is the servant of the defendant and not of the owner of the horse and carriage, the defendant will be liable for the injury caused if it was committed by the servant in the course of his employment, and the owner of the horse and carriage will be under no liability. If, however, the coachman was not acting within the scope of his employment at the time when the injury was committed, the master will be free from liability, unless, indeed, he has made himself liable by ratification of his servant's act. (Underhill on Torts, 2nd ed. 30, 37 ; Indermaur, C. L. 2nd ed. 345.)

(2.) The defendant is not liable for the injury, as the persons by whom it was committed were not his servants, but the servants of the sub-contractor ; who of course is liable if the injury was committed by the servants while acting within the scope of their employment. (Underhill on Torts, 2nd ed. 37, 38 ; Indermaur, C. L. 2nd ed. 335.)

REVIEWS.

OUTLINE OF AN ACTION UNDER THE ONTARIO JUDICATURE ACT, by Walter Barwick, Esq., of Osgoode Hall, Barrister-at-Law. Toronto, WILLING & WILLIAMSON.

Attention has already been called in the columns of the LAW JOURNAL to the two excellent annotated editions of the Judicature Act, by Mr. Maclennan and Messrs. Taylor & Ewart, These have now been in the hands of our readers for some time, and the profession is largely indedted to them for the light thrown on the new system. Mr. Barwick's "Outline of an Action" under the new practice, is another valuable contribution to the rapidly increasing literature of an Act which naturally requires all the light which its interpreters can cast upon it. The little work before us does not lay claim to originality of plan or treatment. It is founded, as the title page informs us, on Boyle's "Précis of an Action" under the English Judicature Acts and Rules, a book well known to the profession. A glance at the "outline" will show its nature and its practical value at such a time as this, when unfortunate attorneys are taking their first steps in the *terra incognita* of the new practice. To many of these gentlemen it will be a great boon to have the enactments scattered throughout the Act and Rules brought together in natural order in connection with the successive steps of an action, so that a few moments will generally put them in possession of information which would otherwise necssitate a tedious and uncertain search through the manifold sections and rules of what a sufferer has called the "Statute of Afflictions." The "Outline" will also be of great value to law students as a means of guiding and simplifying their study of the Act, which will henceforward be one of the subjects for their final examinations.

CORRESPONDENCE.

Conveyancing Charges.

To the Editor of the CANADA LAW JOURNAL :—

SIR,—I beg to direct the attention of your readers and especially the Benchers of the Law Society to the necessity of a tariff of fees for conveyancing being settled upon, and to the effect on the profession of the low charges for conveyancing made by some of its more prominent members in this city. The Editors of the LAW JOURNAL have at various times commented very unfavourably on Barristers advertising that they will do conveyancing at half the usual charges. Although I strongly disapprove of such advertising as being in the highest degree unprofessional I do not think that it is fair that these enterprising gentlemen should be dis-

countenanced by the LAW JOURNAL, and reprimanded by the Law Society, while many of the leading firms in Toronto, who are solicitors for mortgage companies, *are advertised* by their respective companies as being willing to do the necessary conveyancing in connection with the loaning of money at something less than half the usual charges. Recently I loaned a sum of $1,100 on mortgage, and charged, including disbursements, the sum of $24—for examining title, drawing the mortgage and making the necessary searches; the mortgagor objected to pay so much on the ground that Messrs. —— the solicitors of a mortgage company, would not have charged half as much. I pointed out to him what I had done and what were the usual charges for the services I had rendered; however, as he remained dissatisfied, and evidently thought I was imposing on him, I receipted the bill of costs and ordered him out of my office. Possibly I do not look at this matter in the right way; be that as it may, in my view of it it is both unfair and unjust to the other members of the profession for a lawyer to charge $5 for services worth double that amount, and for which other lawyers are charging double.

Yours, &c.,

C. M.

Toronto, Aug. 25th, 1881.

[This letter opens up a rather important question, and one that requires careful consideration in all its bearings.—ED. L. J.]

Judicature Act—Procedure in County Courts.

To the Editor of the CANADA LAW JOURNAL:

SIR,—A recent article on this Act in one of the daily papers stated that the law of set-off and cross claims is to be recognized in the County Courts as in the High Court, that cases brought in the County Court may be transferred into the High Court, and that otherwise the County Courts and Division Courts and their practice and jurisdiction remain as they were before the passing of the Act. The writer of the article appears to have overlooked Order 60 in the schedule of the Act where there are several important provisions made in reference to the Superior Courts, and to which it may be well to call attention so that they may not escape the notice of any of those more immediately interested:—

By Rule 1 of this order County Court Terms are abolished, though there are to be sittings at the same periods as the Terms.

Rule 2 changes the times for holding Court to try cases where no jury is required, from the first Monday to the first Tuesday in the months of April and October.

Rule 3 provides for the sitting of County Court judges at any time for the transaction of business.

Rule 4 enables County Court judges to have control of the costs in cases beyond the jurisdiction brought in County and Division Courts.

And Rule 5 directs that the pleadings, practice and procedure for the time being of the High Court shall apply to the County Courts wherever the present pleadings, practice and procedure of the County Courts correspond with those of the Superior Court of law.

This last rule, it appears to me, makes a most sweeping charge, as the great proportion of County Court procedure corresponds with that of the Superior Courts, so that of whatever difficulties may arise in the carrying out of the new procedure the County Court judges may expect a full share.

It appears that none of the learned authors of the two excellent works that have been published upon the Act have thought it necessary to waste any comments upon this Rule (5), but a little reflection will show that instances may arise where the practitioner will be in doubt what practice to follow. Take the case where it is desired to have a Division Court judgment removed to the County Court. Of course the old practice will be followed so far as relates to the issue of the transcript and the filing of same in the County Court office, but when this is done and it becomes necessary to issue execution, some difficulty will arise. The new procedure must be followed, the former writ of execution in the County Court being similar to a Superior Court writ; but to mould the form of *fi. fa.* given in the Act to meet such a case will require almost total destruction, the leaving out of about two-thirds of the form and the alteration of the remainder. Rule 349 fortunately allows a good deal of latitude, so it is hoped that even in such a minor matter as this a satisfactory solution will be arrived at, and the

Act be found to run as smoothly as its most ardent admirer could desire.

Yours, etc.,

BARRISTER.

LATEST ADDITIONS TO THE LIBRARY OF OSGOODE HALL.

BILLS OF LADING.—A treatise on the Law of Bills of Lading, with Forms. By Eugene Legget, Solicitor. Stevens & Sons, London, 1880.

BIOGRAPHY.—Men of the Time. A dictionary of contemporaries. By Thompson Cooper, F. S. A. Tenth edition. George Routledge and Sons, London, 1879.

CHATTEL MORTGAGES.—A Treatise on the Law of Mortgages of Personal Property. By Leonard A. Jones. Houghton, Mifflin and Co., Boston.

COPYRIGHT.—The Law of Copyright in works of Literature and Art; together with International and Foreign Copyright, with the Statutes relating thereto. By Walter Arthur Copenger, Esq. Second edition. Stevens and Haynes, London, 1881.

CHURCHWARDENS.—The Churchwarden's Guide. By W. G. Brooke, M. A. Tenth edition. Knight & Co., London.

DIGEST.—Digest of the Reported Decisions for the year 1880. By Thomas Willis Chitty and John Mews, Esqrs. Henry Street, London, 1881.

CONVEYANCING.—A short epitome of the principal Statutes relating to conveyancing. By George Nichols Marcy, Esq. Third edition. Davis and Son, London, 1881.

FOREIGN JUDGMENTS.—Foreign Judgments, Part II. The effect of an English judgment abroad. Service on absent defendants. By Francis Taylor Piggott, M.A., LL.M. Stevens & Sons, London, 1881.

INTERPLEADER AND ATTACHMENT.—Interpleader and Attachment of Debts in the High Court of Justice, and in the County Courts, with Forms. By Michael Cababe, Esq. William Maxwell and Son, London, 1881.

LANDLORD AND TENANT.—Woodfall's Law of Landlord and Tenant. Twelfth edition. By J. M. Laly, Esq., Henry Street, London. 1881.

LEADING CASES.—An epitome of leading Conveyancing and Equity cases, with notes. By John Indermaur, Solicitor. Fourth edition. Stevens and Haynes, London, 1881.

LIBEL AND SLANDER.—A digest of the Law of Libel and Slander, with Precedents. By W. Blake Odgers, M.A., LL.D. Stevens & Sons, London, 1881.

MARINE INSURANCE.—A Practical Treatise on the Law of Marine Insurance. By Richard Lowndes, Esq. Stevens and Sons, London, 1881.

PATENT CASES.—Appendix to Higgins's Digest of Patent Cases, containing those decided between June, 1875, and March, 1880. By Clement Higgins, Esq. Stevens and Haynes, London, 1880.

PRACTICE.—A manual of the Practice of the Supreme Court of Judicature, intended chiefly for the use of students. By John Indermaur, Esq. Stevens & Haynes, London, 1881.

The practice of the Supreme Court of Judicature, alphabetically arranged. Designed by F. O. Crump, Esq. Part I., Chancery Division. By Frank Evans Esq. Horace Cox, London, 1881.

RAILWAYS.—Railway Passengers and Railway Companies, their duties, rights and liabilities. By Louis Arthur Goodeve. Stevens & Haynes, 1880.

The Law of Railway Companies, with the Acts and orders. By T. H. Balfour Browne, and H. S. Theobald, Esqs. Stevens & Sons, London, 1881.

SPECIFIC PERFORMANCE.—A treatise on the Specific Performance of Contracts, by the Hon. Sir Edward Fry; 2nd edition by the author and William Donaldson Rawlins, Esq. Stevens & Son, London, 1881.

TORTS.—Moak's Underhill on Torts, First American, from the Second English edition, with American cases. By Nathaniel C. Moak, Counsellor-at-law. William Gould and Son, Albany, New York, 1881.

The following officers have been sworn in under the Judicature Act:—

Master in Chambers.—Mr. R. G. Dalton, Q.C.

Master in Ordinary.—Mr. T. W. Taylor, Q.C.

Registrar of the Queen's Bench Division.—Mr. R. P. Stephens.

Taxing Officers.—Mr. S. B. Clarke and Mr. J. H. Thom, taxing officers for the Common Pleas and Chancery Divisions of the Supreme Court respectively.

Registrar of the Chancery Division.—Mr. G. S. Holmsted, Registrar and Senior Judgment Clerk of the Chancery Division.

Clerk of the Records and Writs, Chancery Division.—Mr. Geo. M. Lee.

The other officers and clerks retain the offices held by them under the old system.

Law Society of Upper Canada.

OSGOODE HALL.

EASTER TERM, 44TH VICT.

During this Term the following gentlemen were called to the degree of Barrister-at-Law :—

George Bell, with honors; John O'Meara, Charles Henry Connor, George Macdonald, John Birnie, jr., Charles Egerton Macdonald, Howard Jennings Duncan, Stewart Campbell Johnstone, Lendrum McMeans, William Boston Towers, Francis Edward Galbraith, Charles Wright, John Kelley Dowsly, Chas. Herbert Allen, Charles Elwin Seymour Radcliffe, James Leland Darling, John Clark Eccles, George William aker, Hedley Vicars Knight, George Ritchie.

(The names are placed in the order of merit).

And the following gentlemen were admitted into the Society as Students-at-Law, namely :—

GRDUATS.

Adam Carruthers, B.A., James Alexander Hutchinson, B.A., George Frederick Lawson.

MATRICULANTS OF UNIVERSITIS.

John L. Peters, Morris Johnson Fletcher, Francis Cockburn Powell, Toronto University.

JUNIOR CLASS.

Herbert Gordon Macbeth, Alson Alexander Fisher, William Edward Sheridan Knowles, Thomas Hobson, Robert Alexander Dickson, Peter D. Cunningham, Alexander McLean, William Thomas McMullen Miron Ardon Everts, William John McWhinney, Richard Armstrong, Alexander Duncan McLaren, Edward Corrigan Emery, John Craine, Joseph McKenzie Rogers, W. Arthur Ernest Kennedy, Geo. Herbert Stephenson, Arthur W. Wilkin, Walte George Fisher.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

1881.
- Ovid, Fasti, B. I., vv. 1-300; or, Virgil, Æneid, B. II., vv. 1-317.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History—Queen Anne to George III.
- Modern Geography—N. America and Europe.
- Elements of Book-keeping.

In 1882, 1883, 1884 and 1885. Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

Students-at-Law

CLASSICS.

1881.
- Xenophon, nabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero in Catilinam, II., III., IV.
- Ovid, Fasti, B. I., vv. 1-300.
- Virgil, Æneid, B. I., vv. 1-304.

1882.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum, (B. G. B. IV. c. 0-36, B. V., c. 8-23.)
- Cicero, Pro Archia.
- Virgil, Æneid, B. II., vv. 1-317.
- Ovid, Heroides, Epistles V. XIII.

1883.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum.
- Cicero, Pro Archia.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Heroides, Epistles V. XIII.

1884.
- Cicero, Cato Major.
- Virgil, Æneid, B. V., vv. 1-361
- Ovid, Fasti, B. I., vv. 1-300.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.

1885.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid Bb. I., II., III.

ENGLISH.

A Paper on English Grammar.
Composition.
Critical Analysis of a selected Poem :—
1881.—Lady of the Lake, with special reference to Cantos V. and VI.
1882.—The Deserted Village.
The Task, B. III.
1883.—Marmion, with special reference to Cantos V. and VI.
1884.—Elegy in a Country Churchyard.
The Traveller.
1885.—Lady of the Lake, with special reference to Canto V.
The Task, B. V.

HISTORY AND GEOGRAPHY.

English History from William III. to George III., inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek :—

FRENCH.

A paper on Grammar.
Translation from English into French Prose :—
1881.—Emile de Bonnechose, Lazare Hoche.

OR, NATURAL PHILOSOPHY.

Books.—Arnott's Elements of Physics, 7th edition, and Somerville's Physical Geography.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination, to be passed in the third year before the final Examination, shall be :—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery; O'Sullivan's Manual of Government in Canada; the Dominion and Ontario Statutes relating to Bills of Exchange and Promissory Notes, and Cap. 117, R. S. O., and amending Acts.

The Subjects and Books for the Second Intermediate Examination to be passed in the second year before the Final Examination, shall be as follows :—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing, (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law; Underhill on Torts; Caps. 49, 95, 107, 108, and 136 of the R. S. O.

FINAL EXAMINATIONS.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Smith on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Harris's Principles of Criminal Law, and Books III. and IV. of Broom's Common Law, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Smith on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

The Primary Examinations for Students-at-Law and Articled Clerks will begin on the Second Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

The Second Intermediate Examination, on the 3rd Tuesday, except in Trinity Term.

The First Intermediate, on the 3rd Thursday, except in Trinity Term.

The Attorneys' Examination, on the Wednesday, and the Barristers' Examinations, on the Thursday before each of the said Terms.

FEES.

Notice Fees	$1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Attorney's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fees each,	1 00
Fee in Special Cases additional to the above	200 00

The following changes in the Curriculum will take effect at the examination before Hilary Term, 1882:—

FIRST INTERMEDIATE.

Williams on Real Property; Smith's Manual of Common Law; Smith's Manual of Equity; the Act respecting the Court of Chancery; Anson on Contracts; the Canadian Statutes relating to Bills of Exchange and Promissory Notes, and Cap. 117 R.S.O. and Amending Acts.

SECOND INTERMEDIATE.

Leith's Blackstone (2nd edition); Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages and Wills); Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act; Caps. 95, 107 and 130 of the Revised Statutes of Ontario.

FOR CERTIFICATE OF FITNESS.

Taylor on Titles; Hawkins on Wills; Taylor's Equity Jurisprudence; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and the Pleadings and Practice of the Courts.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's Principles of Criminal Law, and Books III. and IV. of Broom's Common Law; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills; the Statute Law and the Pleadings and Practice of the Courts.

Canada Law Journal.

VOL. XVII. SEPTEMBER 15, 1881. NO. 17.

DIARY FOR SEPTEMBER.

2. Fri..Beauharnois, Governor of Canada, 1726.
3. Sat..Trinity Term ends.
4. Sun..*12th Sunday after Trinity.*
7. Wed..Court of Appeal sittings begin.
10. Sat..Sebastopol taken, 1855.
11. Sun..*13th Sunday after Trinity* Peter Russell, President, 1796.
12. Mon..Frontenac, Gov. Canada, 1672.
13. Tues..Co. Ct. sittings for York begin. Quebec taken by British, under Wolfe 1759.
17. Sat..First U. C. Parliament met at Niagara, 1792.
18. Sun..*14th Sunday after Trinity.*
19. Mon..Lord Sydenham, Gov. General, died, 1841.
24. Sat..Guy Carleton, Lieutenant-Governor, 1766.
25. Sun..*15th Sunday after Trinity.*
29. Thurs..Michaelmas Day.
30. Fri..Sir Isaac Brock, President, 1811.

TORONTO SEPT. 15, 1881.

WE are requested to announce that in the absence of any special direction as to settlement of orders made by a Judge in Chambers, the Chancellor has directed such orders to be settled by Mr. F. Arnoldi, the Clerk in Chambers, Chancery Division.

THE *Canada Gazette* of the 3rd inst. announces the appointment of the several judges of the old Courts of Law and Equity in Ontario as judges of the Supreme Court and of the High Court of Justice, and of their several Divisional Courts—a formidable array certainly, but done doubtless *e majore cautelæ.*

A CORRESPONDENT from a county town writes as follows:—"The LAW JOURNAL is greatly appreciated here, and your latest improvement, the digest of English decisions on the Judicature Act, will make it more so." He adds that there will be a number of new subscribers from his county. We are glad that our exertions to keep up with the times are appreciated.

COUNTY judges are local judges of the High Court of Justice. Do they require commissions from Ottawa as well as their brethren of Osgoode Hall? If so, these should be ready before 1882 opens. By a merciful provision of the Legislature these longsuffering "maids-of-all-work" will be saved some of the trouble that has overtaken the judges of the High Court, in that the practice will, by the end of the year, be much better understood than it is at present.

MR. DALTON is gradually evolving order out of chaos at Osgoode Hall. Despairing clerks are gradually assuming a less hopeless aspect, while those distracted masters who have sought to save them from the, we trust, temporary maelstrom of the Judicature sea, have fewer suicidal tendencies than they had a few weeks ago. The Court of Appeal is also hard at work, and the machinery of the great legal mill is again slowly revolving, with prospects of a fair amount of grist for the coming season.

WE have received from no less than four sources the advertisement of a very much certificated individual in Western Ontario. We are proud to own such a man as a brother. He is all that we are, and several things besides. Like ourselves, he gives advice free. Ours, however, is not always acceptable, being generally blunt, though to the point,

whilst his style is more ornate, and abounds in redundancy of expression. The fact that *he* remits collections promptly seems hard on the other practitioners in his neighbourhood. It is affecting to hear it stated that he is compelled to make his charges for conveyancing very low; but there is, we know, great competition, and modest merit is always at a disadvantage. The N. B. seems unnecessary, but country people are often very dense and a "damnable iteration" is a matter of necessity. The following is the professional (?) card alluded to, name "for obvious reasons" omitted:—

Solicitor to the Supreme Court of Judicature.
Attorney-at-Law, &c.

Member of the Law Society of Upper Canada, Graduate of the Law School, one of the Attorneys of her Majesty's Courts of Queens Bench and Common Pleas, and a Solicitor of the Court of Chancery for Ontario, Proctor in the Surrogate, Bankruptcy, Probate and Admiralty Courts, Solicitor in the Supreme Court and to the High Court of Judicature for Ontario. Member of the Dominion Solicitors' Association. Notary, &c., &c. Advice free. Collections promptly remitted. Conveyancing charges very low.
N.B.—Admitted to practice in all the Courts.

PAYMENT INTO COURT.

A correspondent has sent us a communication on the subject of the effect of payment into Court when actions are brought in the Superior Court which might have been brought in an Inferior Court. He observes that, although since the case of *Garnett* v. *Bradley*, L. R. 3 App. Cas. 944 taken in connection with our Order 50, r. 1 (No. 428) which provides that subject to the provisions of the Judicature Act, the costs *of and incident to all proceedings in the High Court shall be in the discretion of the Court*, such matters have not the importance they had before—yet, as a judge would probably be guided as to what was the law before the Judicature Act in allowing or in refusing costs, it is well to point out a probable misconception that existed in many minds as to the effect of payment into Court. The writer thus discusses the subject:—

"There is, as far as we are aware of, but one reported case in our own courts upon the above subject—*Leslie* v. *Forsyth et al.*, 1 C L. J. 188. In that case an action was brought in the Superior Court for a sum presumably beyond the jurisdiction of the County Court. The plaintiff accepted $152 in full of his claim in the suit, leaving the costs to be settled by agreement or taxation. A dispute then arose between the parties whether the plaintiff was entitled to County Court or Superior Court costs, the defendant contending that as the plaintiff accepted a sum clearly within the jurisdiction of the County Court, he should have only County Court costs. The matter came before C. J. Richards, in Chambers, and he certified for full costs. He states in the reported judgment of the case that 'the plaintiff is in the same position as if the money had been paid into Court, the effect of which I take it would be to admit the plaintiff's right to full costs.' In many instances, it is believed, this has been accepted as the proper view to take of the effect of such payments, which view, we think, may be seriously questioned in the light of several English authorities decided since this case was reported.

One of the earliest cases upon the subject is *Crosse* v. *Seaman*, 11 C. B., 524, where a plaintiff recovered, with an amount paid into Court, in all over £20. It was held that the proper view was to take into consideration what was recovered, or rather resulted to the plaintiff from the action, and the plaintiff was allowed full costs. This decision is only what would be anticipated from a common sense view of the Act relating to the question of costs, in the class of cases we allude to. This case was followed by *Chambers* v *Wiles*, 24 L. J. B. 267, the spirit of which is in favour of the view of C. J. Richards, in *Leslie* v. *Forsyth et al*, and no doubt he had that case in mind when he decided as he

did. This case, however, is followed by two cases, *Parr* v. *Lillicrap*, 1 H. & C., 615, and *Boulding* v. *Tyler*, 3 B. & S., 472, the latter of which distinctly followed the former, and over-ruled *Chambers* v. *Wiles*.

In both cases actions were brought in the Superior Court for sums clearly within the jurisdiction of the County Court, and the defendant in each pleaded payment into court of the specific sums claimed. The Exchequer Court affirmed the order of Martin, B., disallowing the plaintiff's costs, and expressly held that payment into Court did not, *per se*, entitle the plaintiff to his costs. In *Boulding* v. *Tyler* the Court of Queen's Bench followed the decision of the Exchequer Court, and refused to follow *Chambers* v. *Wiles*, so that the law upon the subject may now be said to be settled, and adversely to the view of C. J. Richards, enunciated in *Leslie* v. *Forsyth et al.*

In cases brought to trial the Judge might certify under sec. 347 cap. 50, R. S. O., either to entitle the plaintiff to full costs or to County or Division Court costs, or to prevent the defendant deducting costs; but in the absence of any certificate the statute apparently applies to cases where money has been paid into Court, unless the plaintiff recovers, with the money paid in, a sum in excess of the jurisdiction of the Superior Court and within the competence of the Superior Court. The wording of the sections of the English County Court Act affecting such cases, is sufficiently identical with the corresponding section in our C. L. P. Act (sec. 346, cap. 50 R. S. O.), as to lead us to believe that the decisions we refer to ought to be accepted here.

While referring to the general question of costs it may be pointed out that while costs may be refused to successful litigants, following the practice of Courts of Equity from time immemorial, still it is only in very rare instances where costs will not follow the result. In what are termed hard cases, and in cases when one of the parties has proceeded upon the faith of a decided case which by the case in question is overruled, and in a few other instances a Judge may interfere, but such interference will very rarely occur, and only for well established reasons."

LAW SOCIETY—TRINITY TERM.

The following is the *resumè* of the proceedings of Convocation, published by authority.

Monday, August 22, 1881.

Present—Messrs. Maclennan, Crickmore, Read, McMichael, J. F. Smith, Hoskin, Bethune, Moss, Glass, Mackelcan, Kerr, and Benson.

In the absence of the treasurer, Mr. Maclennan was appointed Chairman.

Ordered, that the following be appointed a special Committee to confer with the Judges of the Supreme Court of Judicature on the new rules and tariff of fees for the High Court of Judicature, namely, Messrs. Bethune, Maclennan, Hoskin, McMichael, Mackelcan, Glass, Benson, and Kerr.

Messrs. Read, Benson, Smith and Moss were appointed a special committee to report upon candidates entitled to be called with honours and to receive medals under the rules of Convocation.

The committee reported that Mr. J. H. M. Campbell was entitled to be called to the Bar with honours, and to receive a gold medal.—Ordered accordingly.

Ordered, that the following gentlemen be also called to the Bar, namely, Messrs. Watson, McBeth, Crawford, Lavell, Mills, McCarthy, McNab, Scott, C. Bitzer, Macara, McKay, O'Brian, Thompson, Kittermaster, Ford, Curry, Lewis, Gilbert, Morphy, McGill, Miller, Case, Harper, Duncombe. The above-named gentlemen, with the exception of Messrs. Gilbert and Lavell, attended, and were called to the Bar.

Ordered, that the following gentlemen do receive their certificates of fitness, namely:—Messrs. Campbell, Mills, Williams, Bitzer, Ford, Macara, Curry, McBeth, Yale, Miller, Dawson, Lefroy, Lee, Scott Cunningham, Baker, Beavers, Thompson, Sparham, Carbert, Going, and McKay.

Ordered, that the first intermediate ex-

amination of the following candidates be allowed them as students and articled clerks, namely:—Messrs. D. K. J. McKinnon, G. W. Ross, D. Thompson, H. J. Peck, W. D. Thurston, W. E. Stratton, P. S. Campbell, T. A. Elliott, W. A. Dowler, G. R. Caldwell, T. Moffatt, J. W. McCullough, F. H. Gilman, M. N. Brown, T. B. Shoebotham, A. B. Fischer, J. E. Moberly, G. T. Scilly, A. D. McIntyre, J. S. Garvin and T. E. Titus.

Ordered, that the second intermediate examination of the following candidates be allowed them as students and articled clerks, namely:—Messrs. A. Mills, P. S. Carroll, R. A. Porteous, B. M. Toothe, Hon. D. Mills, E. R. Cameron, W. Cavell, G. Davis, H. S. Blackburn, R. C. Hays, J. W. Elliott, J. A. Reid, J. F. Canniff, T. Chappell, R. Holmes, W. D. Smith, A. D. Howard, W. L. Haight, A. W. Peterson, T. E. Moberly, W. Johnston, R. Patterson, R. O. Kilgour, W. H. Barry, J. Stewart, O. M. Jones, W. J. Martin, W. Campbell, E. Poole, J. A. Thomas, W. Daly, J. B. Hands, W. E. Stevens.

Ordered, that the following gentlemen, graduates, be entered on the books of the Society as students-at-law, namely:—Hugh St. Quentin Cayley, W. D. Gwynne, T. C. Milligan, Milligan, Alfred M. Walton, Douglas Armour, Thomas B. Bunting, Walter Laidlaw, Thomas J. Blain, George W. Field, Samuel C. Smoke, Henry H. Allen, Frederick W. Hill, Chas. W. Lasby, John B. Jackson, James M. McCollum, Thomas E. Williams, George Morton, Fred E. Nelles, Alex. C. Rutherford, Frank Henry Keefer, Lucius Q. Coleman, Henry Thomas Shibley, Joseph W. St. John, and John Douglas. That the following gentlemen as Matriculants of Universities be also entered on the books as students-at-law, namely:—E. W. H. Blake, Herbert C. Parks, E. C. Higgins, William H. Holmes, and R. S. Smith.

Ordered, that the following gentlemen who have passed the examination be entered on the books as students-at-law, namely:—W. M. Douglas, G. M. Bourinot, Thomas Urquhart, A. W. Marquis, J. B. Dalzell, O. L. Lewis, Frederick Stone, A. D. Hardy, D. J. Thomson, J. C. Judd, P. Ellis, J. O'Hearn, F. McPhillips, H. Clay, R. C. Dickson, A. C. Camp, John Carson, D. H. Cole, T. Steele, A. C. Halter, M. J. McCarron, R. G. Fisher, C. Meek, F. Holmes, P. Kingston, H. G. Tucker, R. Vanstone.

Ordered, that Mr. W. M. Sinclair be entered on the books as having passed his examination as an articled clerk.

A petition from law students and others, in reference to the establishment of a Law School, was ordered to be considered on the 23rd inst.

Ordered, that Mr. Ferguson's motion in reference to a Law School do stand until the 23rd instant.

Ordered, that notices of the meetings of Convocation be sent to the Hon. S. H. Blake, as an *ex officio* Bencher.

Monday, August 23.

Present—Messrs. Maclennan, Crickmore, Read, Benson, Moss, McMichael, Kerr, Bethune, Glass and Hoskin.

Mr. Maclennan in the chair.

Ordered, that the consideration of the report of the special committee on the subject of keeping the Library open at night be postponed until the first Tuesday of next Term.

Ordered, that the motion relating to a Law School, and the consideration of the petition of students on the same subject, be postponed until 27th inst.

Mr. James Beaty, Q.C., was elected a Bencher in the place of V. C. Ferguson.

Ordered, that a call of the Bench be made for Friday, 2nd September, to elect a Bencher in place of the late W. H. Scott, deceased.

Ordered, that a portrait of Hon. Chancellor Boyd be painted for the Law Society, by Mr. Berthon.

Ordered, that the same aggregate amount of fees and fines as at present payable by attorneys and solicitors continue to be payable by solicitors of the Supreme Court of Ontario.

Saturday, August 27.

Present—Messrs. Maclennan, Crickmore, McMichael, Moss, Hoskin, Beaty, Kerr and Hardy.

Mr. Maclennan in the chair.

Messrs. Crickmore, Moss and Beaty were appointed a special committee to report forthwith as to who, if any, were entitled to honours or scholarships on the second Intermediate Examination.

The committee reported that Messrs. A. Mills, P. S. Carroll and G. Davis had passed with honours, and that Mr. A. Mills was entitled to the first scholarship, Mr. P. S. Carroll to the second scholarship, and Mr. G. Davis to the third scholarship.—Ordered accordingly.

Ordered, that the petition of law students relating to a Law School, and the subject matter of the motion on the same subject, referred to a special committee, composed of the Finance and Legal Education Committees, and of Messrs. Glass, Robertson, and Britton, to report upon the expediency of establishing a Law School, and if considered expedient, to report upon a scheme for that purpose; that the committee report at next meeting of Convocation, and that members be notified that the report will then be considered.

Ordered, that the name of Hon. S. H. Blake be added to the committee to confer with the Judges on the new orders and tariff.

Ordered, that Mr. Beaty be placed on all the committees of which Mr. Justice Ferguson was a member.

Friday, September 2.

Present—Messrs. Maclennan, Crickmore, Martin, S. H. Blake, Ferguson, Hardy, Beaty, Glass, Bethune, Kerr, Moss, Read, McMichael, Foy. Mr. Maclennan in the the chair.

The Legal Education Committee reported on the papers of Mr. F. F. Harper and E. N. Lewis, and on the petitions for admission of J. P. Eastwood and of J. W. White.

Ordered, that Mr. F. F. Harper receive his certificates of fitness; that Mr. E. N. Lewis receive his on completing his papers to the satisfaction of the Secretary; that Messrs. J. P. Eastwood and J. W. White be admitted as students in the Matriculant class.

The report of the Special Committee appointed to confer with the government on the short-hand writer's charges received and read.

The Committee on the new orders and tariff was re-appointed.

The report of the Committee on Reporting was received and read as follows:

REPORT.

The Committee on Reporting beg leave to report as follows:—

1. The Committee has had under consideration the changes which it is expedient to make in the system of reporting under the Judicature Act, and they beg to make the following recommendations:

1. That the gentlemen who have heretofore been the reporters of the decisions of the Courts of Queen's Bench, Chancery, and Common Pleas, be appointed joint reporters of the decisions of the High Court of Justice with the same salaries as heretofore.

2. That the said decisions be all printed and published in one series of volumes of the same size and in the same style, as nearly as possible, as at present, to be numbered consecutively, and to be called the Ontario Reports.

3. That the present reporter of the Court of Appeal be appointed reporter of the decisions of the Court of Appeal for Ontario, with the same salary as at present, and that such decisions be printed and published in a series of volumes to be called the Ontario Appeal Reports, uniform in size and style with the present series, and to be numbered consecutively.

4. That the present reporters of the decisions in Chancery and Common Law Chambers be appointed joint reporters of the decisions of the judges and officers of the High Court and of the Court of Appeal in Chambers, and on questions of practice, and that such decisions be printed and published in a series of volumes to be called the Ontario Practice Reports.

5. That all or any of the said reporters shall, if and whenever requested by Convocation, assist in reporting decisions in contested election cases under regulations to be made hereafter.

6. It shall be the duty of the Editor to oversee the whole work of reporting, and to insure its efficient and prompt execution, and to make such arrangements with the Judges and officers of the Courts that a report of all important decisions may be secured to the profession.

JAMES MACLENNAN,
Chairman.

The report was considered and adopted.

The Hon. Christopher F. Fraser was elected a Bencher in the place of Mr. W. H. Scott, deceased.

The report of the Special Committee on the Law School was received and read.

Ordered, that the further consideration of the report be postponed till the first Tuesday of next Term, that meantime the material portions of the report be printed, and that notice be given by the Secretary to each Bencher two weeks before the first day of next Term.

The report of the examiners on the honour examination in connection with the first Intermediate Examination, was read.

Ordered, that Mr. D. K. I. McKinnon be passed with honours and receive the first scholarship.

J. K. KERR,
Chairman Committee on Journals.

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

CHANCERY.

September 2.

TURNER v. SMITH.

Demurrer—Married women—Separate estate.

The mere fact that a person has a claim against a married woman, does not create a lien in favour of the creditor upon her separate estate ; and a bill having been filed by the creditor against trustees of a fund to which a married woman was entitled, seeking to compel them to retain the fund until he could recover judgment. A demurrer thereto for want of equity was allowed with costs.

Muir, for demurrer.

W. Caseels, contra.

HAYES v. HAYES.

Appeal from Master—Trustee and cestui que trust—Just allowances—Special findings—Power and duty of Master as to.

The defendant was the assignee of a policy of assurance on his mother's life in trust to pay himself certain moneys and expend the residue in the support and maintenance of the assured's family,—and having made further advances on the advice of his brother who was a practising barrister, took a second assignment of the policy absolute in form. On the death of the assured the defendant asserting a right to obtain payment of the policy went to the head office of the company in the United States, in order to hasten payment, pending a dispute with the plaintiffs—the family of the assured—as to his rights. In taking the accounts between the parties the Master found that the defendant acted *bona fide* in so doing, and allowed his expenses, although the company, at the instance of the plaintiffs, refused to pay him, and sent the proceeds of the policy to their solicitor, in Toronto, to be paid over to the party entitled.

Held, on appeal from the Master (affirming his ruling) that as the defendent was under either assignment entitled to possession of the fund—either as trustee or individually—and as the Master under all the circumstances thought fit to allow such expenses, and it did not appear clear to the Court that such allowance was wrong, the item should be allowed.

Held, also, that the master had properly allowed to the defendant in his accounts a fee of $10 paid by him to counsel for advice as to his action in respect of the two assignments.

The Master, at the request of the defendant, reported specially in his favour as to money matters not particularly referred to him, but which formed the subject of charges of fraud made in the bill of complaint.

Held, that the Master had power to report specially any matters he deemed proper for the information of the Court and that it was his duty to so report any matter bearing on the question of costs.

When the case was before the Master, the plaintiffs offered to put in evidence some letters then produced but not identified. It being objected that the letters referred to a branch of the case which had been disposed of at the hearing, the Master refused to admit such evidence. No tender of any particular class or character of evidence was made, the letters being simply offered.

Held, that, as there was nothing to show that a tender of evidence of a certain character was made, or to show what the rejected evidence was, the appellants were not entitled to a reference back to admit such letters.

Donovan, for appeal.

E. Douglas Armour, contra.

LIVINGSTON v. WOOD.

Judgment—Amending decree to conform to—Costs.

By the decree an assignment of a bond was declared to have been given as a security only, and a further declaration that certain credits were due to the plaintiff, and referred it to the

Master to take the accounts. In proceeding under the decree the defendant was hampered by the declaration in the decree, the Master holding that he was bound by it. On petition to amend the decree, so as to make it conform to the judgment,

Held, that, as it appeared that the judgment was directed solely to the fact that the bond was assigned as a security only, and that the view taken as to the credit was a ground for the holding as to such assignment, and was not a substantial part of the judgment, and the declaration in the decree as to the credit was, therefore, unauthorized.

Hoyles and *Gwyn*, for the petition.

Walter Cassels, contra.

DICKSON V. HUNTER.

Mortgagor and mortgagee—Fixtures.

The plaintiffs were registered mortgagees of a large tract of land. M., desiring to build a mill in a village where part of the land lay, took a deed of a small portion thereof from one of the owners of the equity of redemption, conditioned that he should erect a flouring mill thereon. M., without searching the title and without actual notice of the plaintiff's mortgage, erected the mill with the intention of establishing a business there. Before its completion and before the machinery was put in, he discovered the mortgage, but proceeded to put in a boiler, engine, mill stones and several machines necessary for carrying on milling. On the plaintiff's attempting to sell under their mortgage, the machinery was removed by M. An injunction was granted to stay the removal, and an issue was directed to try the title to the mill and machinery. A number of the machines were not attached to the building, being kept in place by their own weight; but they were necessary for the working of the mill, and suited for that purpose only, and the whole structure—building, engine house, boilers, engine and machinery—was put up with the express purpose of establishing a flouring mill on land that M. believed to be his own.

Held, that the mill and its contents passed to the mortgagees; and an order was made for restitution of the machinery which had been removed, and the injunction extended to prevent its removal in future, with liberty to M. to pay its value to the plaintiffs, which they should accept, if offered, and release the machinery.

Moss, for the motion.

Walter Cassels, contra.

BEATY V. SAMUEL.

Trust for creditors—Secured creditor—Rights of—Creditors not scheduled under Insolvent Act 1875.

The plaintiff, the holder of a chattel mortgage with a covenant for payment, was not scheduled in proceedings in insolvency under the Act of 1875, but he was aware of the proceedings, and the insolvent obtained a final discharge.

Held, that the debt under the chattel mortgage was not extinguished.

A subsequent common law assignment for the benefit of creditors was made by the debtor of all his property to the defendant in trust to pay expenses &c., and "to apply the balance in or towards payment of the debt of the assignor in proportion to their respective amounts without preference or priority.

Held, that the plaintiff was entitled to sue for his whole debt and therefore to share in the estate proportionately under the deed for the whole, and that he was not bound to value his security and rank for the balance only.

Beaty, Q. C., for plaintiff.

Thomson, for defendant.

TAYLOR V. H..LL.

Injunction—Unpaid costs of former motion—Amendment—Service of notice containing—Sufficiency of.

A motion by the plaintiff to continue an *ex parte* injunction was refused with costs, but at the same time leave was given to apply on the return of the motion to amend, and a new injunction was granted *ex parte*. On the return of the motion to continue the latter it was objected that the costs of the former motion had not been paid, which, however, had not been then taxed.

Held, that the non-payment before taxation was no objection to the motion proceeding.

The proposed amendments to the bill were set out substantially in the order for the injunction, which was served on the defendant.

Held, that as the defendant had thereby notice of the proposed amendments, it could not be objected to the motion that the amended bill had not been served.

It appeared that there was a substantial question to be tried, and that no irreparable injury could result by preserving the subject matter of the suit *in medio*, the injunction restraining the defendant from dealing with it was continued to the hearing.

J. H. Macdonald, for plaintiff.

A. Hoskin, Q.C., for defendant.

DUMBLE V. COBOURG AND PETERBOROUGH RAILWAY COMPANY.

Review—Fresh evidence.

In applications to open up proceedings by way of review on the ground of newly discovered evidence, it is necessary for the party applying to establish (1) that the evidence is such that if it had been brought forward at the proper time it would probably have changed the result; (2), that at the time he might have so used it, neither he nor his agents had knowledge of it; and (3) that it could not with reasonable diligence have been discovered in time to have been so used.

Where, therefore, a railway company in the construction of their road took possession of and built their road across a plot of land of the plaintiff, who instituted proceedings to compel payment therefor, and under the decree a sum of $1,800 was found to be the value of such plot, which sum, together with interest and costs, was paid by the company in order to prevent the land being purchased by a rival company, and three years afterwards they applied on petition to have a portion of such purchase money refunded, on the ground that another railway company, whose rights had been assigned to them, had previously paid a prior owner of the land for a portion thereof.

The Court [FERGUSON, J.] refused the relief asked with costs, as the company, had they exercised due diligence in the matter, might have become aware of such prior purchase and payment.

H. Cameron Q. C., and Moss, Q.C., for defendants.

Watson, for plaintiff.

CHANCERY CHAMBERS.

Boyd C.] [Sept. 5.

RE LAWS—LAWS V. LAWS.

Appeal—Notice of—O. J. A. sec. 38.

The notice of appeal required by R. S. O., cap. 38, sec. 26 (sec. 38 O. J. A.) was duly served upon the respondents' solicitors, and they always supposed the judgment to be subject to appeal. But by an oversight of the clerk of the appellant's solicitor, notice of appeal was not given in time to the Registrar of the Court appealed from.

BOYD C., *held* that this was a proper case to exercise the discretion given by the statute, and allowed the notice to be filed within four days on payment of costs of this application.

F. B. Robertson, for appellants.

Delamere, for respondents.

Mr. Stephens.] [Sept. 5.

RE SOLICITORS.

Taxation—Solicitor and client—Form of order—Rule 443.

H. Cassels applied, on behalf of the client, for an order to tax a solicitor's bill of costs, more than a month having elapsed since the delivery of the bill.

Application granted.

Order to issue in the long form in use before the O. J. A., as the Master is mentioned in R. 443, but the taxing officer is the proper officer to tax bills of costs under the act, R. 438.

Ferguson, V. C.] [Sept.

KING V. DUNCAN.

Money paid into Court pending appeal.

Where money is paid into Court for a specific purpose, the party paying it in is entitled to withdraw it when that purpose has been answered in his favour. The bill was filed for an injunction to restrain the defendant from receiving the proceeds of a judgment and execution against his co-defendants, alleged to be fraudulent, the money was directed to be paid into Court "to abide the further order of the Court." The injunction was refused and

the plaintiff gave notice of appeal, and applied for an order to retain the money in Court, pending the appeal.

Held, on appeal from the referee reversing his order, that the money had not been paid into Court for any specific purpose, but to abide the further order of the Court, that it represented the subject matter in the suits, that it was in the discretion of the Court to act in the premises, and that the moneys should remain in Court pending the appeal unless security were given instead.

D. E. Thompson, for the appeal.

Hoyles, contra.

Ferguson, V.C.] [Sept.

PETRIE v. GUELPH LUMBER CO.

Undertaking to speed cause—Dismissal of bill—Relief from undertaking.

The plaintiff undertook upon a motion to dismiss his bill, to bring the cause down at the then next sittings at Guelph. From some correspondence it appeared that if the plaintiff had set his cause down for the then next Guelph sittings, a postponement would have been asked for on the ground of the attendance at the House of Commons of a member who was a defendant. The plaintiff offered to bring the cause down to the then next sittings at Toronto, to which a conditional consent was given; but the cause was not set down. The Referee dismissed the bill.

Held, on appeal, reversing the Referee's decision, that the plaintiff was relieved from his undertaking to bring the cause down to Guelph under the circumstances, and that he was under no obligation to bring the cause down to Toronto, and as no intentional delay was shown on the part of the plaintiff, the bill was restored.

McCarthy, Q.C., for the appeal.

S. H. Blake, Q. C., *W. Cassels*, *Bethune*, Q.C. and *Hoyles*, for the several defendants.

Mr. Stephens.] [Sept. 12.

ADAMSON v. ADAMSON.

Appeal bond—Registration of conveyance of land owned by surety.

This was a motion to disallow a bond given on an appeal.

In the course of the examination of one of the bondsmen, he stated that he had had for some years conveyances to himself of certain lands, but had not registered them. It appeared that the lands were of sufficient value.

Langton, for the motion, objected to the sufficiency of the surety, unless the alleged conveyances were registered, and cited *Curry* v. *Curry*, before the late C. J. of Ontario, not reported, in which a surety was directed to make his title to certain land under similar circumstances a registered one.

Barwick, contra.

MR. STEPHENS directed the conveyances to be registered.

Mr. Stephens.] [Sept. 12.

WETHERHEAD v. WEATHERHEAD.

Service—Infant out of jurisdiction, Rule 36 O. J. A.

This was a partition suit.

W. Roaf applied for an order allowing substitutional service of the bill, on the official guardian of an infant defendant. The infant being resident without the jurisdiction of the Court, and no provision being made for such a case under Rule 36 O. J. A,

MR. STEPHENS allowed the order to go on the ground that the share of the infant in the lands in question amounted to only $40, and substitutional services would be inexpensive.

Boyd C.] [Sept 13.

MCFARLANE v. MCFARLANE.

Examination after answer and disclaimer when fraud charged in bill.

This was a bill to set aside a conveyance as obtained by fraud.

One defendant, the wife of another defendant, filed an answer and disclaimer denying all charges of fraud made against her in the bill, and disclaiming all interest in the subject matter of the suit and asking her costs.

On examination after answer she declined to answer any questions relating to the alleged fraud.

On motion to compel her to attend and be examined at her own expense,

BOYD, C., *held*, that the questions were proper ones to be put and granted the application.

H. Cassels, for the motion, cited *Graham* v. *Cafe*, 9 Symons 93, confirmed on appeal 3 Milne & Craig 98; *Whitney* v. *Rush*, 2 Younge & Collyer, Exchequer R. 546.

W. H. Macdonald, contra, cited *Kerr* v. *Reed*, 22 Gr. 538; *Chaffers* v. *Day*, 3 Weekly Reporter 263; Kerr on Discovery p. 207.

COMMON LAW CHAMBERS.

Osler, J.] [August 10.

REGINA v. BERRY.

Coroner—Jurisdiction—Discharge of prisoner—Inquisition.

A coroner for the County of Carleton was held to have jurisdiction to hold an inquest in the city of Ottawa, situate in that county. An inquisition was, however, held to be defective in not identifying the body of the deceased as being the person with whose death the prisoner was charged, and the prisoner was discharged from custody under the coroner's warrant, but recommitted, as the evidence shewed that a felony had been committed.

Mr. Dalton, Q. C.] [Sept. 8.

ROMANN v. BRODRECHT.

(By original action.)

BRODRECHT v. FICK.

(By counter claim.)

Counter claim—Set-off—Third party—Defendant—Rules 164-165.

Where a defendant by a counter claim puts in a set-off against plaintiff's action, he cannot by his counter claim bring in a third party as a defendant and raise an issue as between himself and such third party, in which the plaintiff is not concerned; such issue must be determined by a separate action.

W. H. Clement, for plaintiff.

J. H. Macdonald, for defendant.

Mr. Dalton, Q.C.] [Sept. 13.

ELLIOT v. CAPELL.

Attachment—Garnishee—Costs.

A defendant who has obtained a judgment for costs may garnishee moneys due to the plaintiff.

The question of the validity of a judgment should not be argued on the return of a garnishee summons, but should be raised on an application to set aside the execution.

Aylesworth, for plaintiff.

J. H. Macdonald, contra.

Mr. Dalton, Q.C.] [Sept. 13.

MCDONOUGH v. ALISON.

Service by mailing—Notice of trial.

Plaintiff's and defendant's attorneys had an arrangement between themselves by which the papers in the suit should be sent by mail. The notice of trial was posted the day before the last for giving notice, but reached defendant's attorney one day too late.

Held, that the notice of trial cannot be set aside.

W. H. Clement, for plaintiff.

W. Fitzgerald, contra.

REPORTS.

RECENT ENGLISH PRACTICE CASES.

(Collected and prepared from the various Reports by A. H. F. LEFROY, ESQ.)

BAINES v. BROMLEY.

Imp. O. 55, r. 1—Ont. O. 50, r. 1, No. 428. Practice—Costs—Claim and counter-claim.

In an action for a liquidated money claim, after trial with jury, judgment was entered for the plaintiff on his claim, but for the defendants for a balance on a counter-claim for goods sold, the amount of which exceeded that of the claim. The judgment directed that the "plaintiff should recover against

* It is the purpose of the compiler of the above collection to give to the readers of this Journal a *complete* series of all the English practice cases which illustrate our present practice, reported subsequently to the annotated editions of the Ontario Judicature Act, that is to say since June, 1881. "L. J. R." stands for the English Law Journal Reports.

the defendants his costs of suit, and that the defendants recover the costs of the counter-claim:"

Held (reversing the judgment of the Exchequer Division), that the plaintiff was entitled to the general costs of the cause.

[C. of A., April 26—50 L. J. R., p. 465.

The facts sufficiently appear from the above head-note. The Master, on taxation, gave the defendants the costs of the cause. The plaintiff appealed, and LOPES, J., having referred the matter to the Court, the Exchequer Division dismissed the summons to review the taxation.

The plaintiff appealed.

BRAMWELL, L. J.—I am of opinion that this appeal must be allowed, because of the terms in which the judgment was expressed; the plaintiff has not had "his costs of suit" taxed to him. No doubt the judgment of the Exchequer Division would be right if the old rule, that the party in whose favour the balance is, on the whole, is entitled to the costs of the cause, which still exists, applied to this case; but that is not the judgment which was here given. I may add that I think cases of set-off and counter-claim are susceptible of different considerations.

BRETT, L. J.—I also think that this appeal must be allowed. The judgment is entered and the costs by it are dealt with as if the defendants had met the plaintiff's claim by a counter-claim in the nature of a cross-action, and not of a set-off, and such judgment stands unchallenged. The question is, How ought the costs to be taxed, when in such a case the plaintiff succeeds on his claim, and the defendants on their counter-claim? If this had been treated as a pure set-off to the amount of the plaintiff's claim, as I think it might have been, and had so appeared on the judgment, then it seems to me that the defendants would have been entitled to the costs of the action, because then the defendants would have denied by way of defence that the plaintiff had any right to bring an action at all. There may be a case where the defence is partly by way of set-off and partly by way of counter-claim, as where the defendant asserts his right to recover the amount of balance due after satisfying the plaintiff's claim by his set-off. It is not necessary to say now how the costs in such a case are to be taxed, because here the judgment is in form not that the defendants have a set-off, but a counter-claim only. It is as if the defendants chose to deny the whole of the plaintiff's claim and to rest on their cross-action. The costs have been taxed, however, as if the plaintiff had not succeeded at all in his action, but only on certain issues, and I think that that was wrong. That alone is sufficient to sustain the appeal. I have, however, a firm opinion that where there is a claim with issues taken on it, and a counter-claim, not a set-off, but in the nature of a cross-action with issues on it, and where the plaintiff succeeds on the claim and the defendant on the counter-claim, the proper principle of taxation, if not otherwise ordered, is to tax the costs of the counter-claim and its issues as if it were an action, and then to give *the allocatur* for costs for the balance in favour of the litigant in whose favour the balance turns. In such a case where items are common to both actions, the Master would divide them. Where the so-called counter-claim is a set-off there is but one action.

COTTON, L. J.—The sole question is whether under this order and judgment the costs have been rightly taxed. The judgment was that the the plaintiff "recover his costs of suit," and not merely the cost of issues found in his favour. I is clear that the judgment has not been followed those costs have not been allowed to the plaintiff, and the taxation must be allowed.

Appeal allowed.

[NOTE.—*Imp. O. 55 r. 1., and Ont. O. 56 r 1 (No. 428) are identical.*]

WALKER v. ROOKE.

Imp. O. 45, *r.* 2—*Ont. O.* 45, *r.* 5, *No.* 370—*Garnishee order—Partnership firm.*

A garnishee order will not be granted on partners in the name of their firm.

[Q. B. D., April 26.—50 L. J. R., p. 470.

This was an application *ex parte* on appeal from a judge at chambers. The order sought was a garnishee order attaching a debt due "from Messrs. Marshall and Snelgrove to the defendant."

The Master refused to grant the order, and the Judge at Chambers affirmed his decision Plaintiff appealed to Divisional Court.

Horne Payne, for the plaintiff. Before the consolidation of the three common law divisions

the practice in each division differed. The C.P. and Q.B. Divisions required the names of the partners to be given.

[LORD COLERIDGE, C. J.—Order 55 r. 2. is taken from the C. L. Proc. Act 1854, and in each section the word "garnishee" is used in the singular number.]

It is submitted it was the intention of the Judicature Act to include "firms" under the words "any other person," and to allow service of garnishee orders on the firms in the same way as service of writs.

Per CURIAM.—The decision of the Master was right, and must be affirmed.

[*Imp. O. 45 1, 2, and Ont. O. 41, 1, 5 (No. 370) differ slightly, but not so as to affect the point here decided. Under our order the affidavit in support need not be sworn by the judgment creditor or his solicitor.*]

RUDOW V. THE GREAT BRITAIN MUTUAL LIFE ASSOCIATION SOCIETY.

Costs—Formal Party.

C. of A., April 26——50 L. J. R. 504. 44 L. T. 688.

JESSEL, M. R. :—The proper practice now is, not, according to the old practice, to direct a plaintiff to pay the costs of a necessary but formal defendant, and to have them over again against the principal defendant, but to pay such a defendant his costs by a direct order. Both the Lords Justices now sitting with me agree with me that that is now the proper practice.

[NOTE.—*The principal point in the above case concerned the interpretation of certain clauses of the Companies' Act*, 1862, *but the above observations appear worthy of note.*]

ELLIS V. ROBBINS.

Imp. O. 37, *r.* 1; *O.* 40, *r.* 1—*Ont. O.* 32, *r.* 1, *No.* 282; *O.* 36, *r.* 1, *No.* 315—*Practice—Motion for judgment—Evidence by affidavit.*

On motion for judgment the Court has no power, under Rules of Court, to order that the evidence shall be taken by affidavit.

[Ch. D. April 28——50 L. J. R. 512.

This was an action for the purpose of rectifying a mistake in a settlement, made by the plaintiff on the occasion of his daughter's marriage. The trustees of the settlement, the plaintiff's daughter and her husband, and their infant child were defendants. A statement of claim was delivered, but no statement of defence were put in, the action being in effect a consent action, and it being conceded that there had been a mistake which ought to be rectified as asked by the statement of claim.

Evidence by affidavit had been given in support of the allegations contained in the statement of claim, and the action had been set down on motion for judgment.

On the action coming on for hearing,

Graham Hastings and *Whately* submitted the question to the Court, whether the Court had power in motion for judgment to accept evidence by affidavit, so as to make a judgment in default of pleading, which would be binding on the married woman and infant defendants. They pointed out that Order 37, r. 1., giving power to the Court to order the evidence to be taken by affidavit, relates only to the trial or hearing of an action, while Order 40, which relates to motion for judgment, is silent on the subject of giving evidence by affidavit.

H. N. Rooper, for the defendants.

HALL, V. C., gave judgment for rectification of the settlement, but directed that notice of trial should be given to the defendants, the infant and married woman, and that the motion should be placed in the paper again on the application of any party *pro forma*, in order to be disposed of.

[NOTE.—*Imp. O. 37, r. 1, and Ont. O. 32, r 1 (No. 282), are virtually identical. Imp. O. 40, r. 1, and Ont. 35, r. 1 (No. 315) are identical.*

ROBINSON V. PICKERING.

Imp. Jud. Act, 1873, *sec. 25, s. s.* 8—*Ont. Jud. Act, sec.* 17, *s. s.* 8—*Married woman—Separate estate—Injunction to restrain dealing with*

The Court will not, in an action by a creditor who has dealt with a married woman on the faith of her separate estate, grant an injunction to restrain her from parting with that estate until the creditor has established his right by obtaining judgment.

[C. of A. February 23——50 L. J. R. 527.

This was an appeal from a decision of Malins,

V. C., who granted an injunction, the nature of which sufficiently appears from the above head-note. The husband and wife appealed.

A. Terrell, for the appellants, cited *Johnson* v. *Gallagher*, 3 Deq. F. & J. 495; 30 L. J. R. Ch. 298; *Owens* v. *Dickenson*, Cr. & Ph. 48; *Murray* v. *Barlee*, 4 Sim. 82; 3 Myl. & K. 209, 3 L. J. R. Ch. 184.

Dundas Gardener, for the plaintiff. The Judicature Act, 1873, s. 25, s. s. 8, authorizes the Court to grant an injunction whenever expedient.

JESSEL, M. R., thought, with great respect to the V. C., that the order had been made improvidently, without regard to the settled law on the subject. The general engagements of a married woman, contracted on the faith of her separate property, no doubt bound that property in this sense, that the creditor could obtain a judgment against the separate estate and could then obtain payment out of it. The married woman stood in much the same position as a man did, who, under the old law, could not be made a bankrupt. The creditor could not get mesne process against the property until he had established his right by a judgment. If this were not so, every married woman who depended on her separate estate would be left to starve as somebody alleged that she was indebted to him. According to well established principle and settled law, creditors of a married woman who had obtained no judgment could not interfere with her right to deal with her separate property.

JAMES, L. J., was entirely of the same opinion. At one time there was a notion that the engagements of a married woman were in the nature of charges on her separate estate. But it was afterwards pointed out that the relation was only that of debtor and creditor with a right to go against the particular fund. If there was a charge, then, as was pointed out by Lord Cottenham in the case of *Owens* v. *Dickenson*, different creditors would have priority in the order of date of their charges. The creditor's only right was to get judgment for his debt, and then execution would go against the separate estate. He agreed with the M. R. that a creditor could no more obtain such an injunction against a married woman than against a man.

LUSH, L. J., concurred, holding the law to be quite settled on the point.

[NOTE.—*Imp. Jud. Act, 1875, s. 25, s. s. 8, and Ont. Jud. Act, s. 17, s. s. 8, are identical.*

CLARKE V. BRADLAUGH.

Time from which writ takes effect—Day, fractions of—Fiction of law.

It appeared from the statement of claim that the writ of summons in the action issued on the 2nd July, and that on the same day, but before the issuing of the writ, the cause of action arose. The statement of claim was demurred to, on the ground that the issuing of the writ of summons being a judicial act, must be considered as having taken place at the earliest moment of the day, and, therefore, before the cause of action accrued:—

Held, that the Court could, for this purpose, take cognizance of the fact that the writ did not issue till later in the day than the cause or action accrued, and that the statement of claim was therefore good.

[Q. B. D. June 21; L. R. 7 Q. B. D. 151; 44 L.T.779.

The facts of this case sufficiently appear from the above head note.

The defendant in person, in support of the demurrer, cited *Reg.* v. *Edwards*, 9 Ex. 32, 628; *Wright* v. *Mills*, 4 H. & N. 491, and several other cases.

Sir Hardinge Giffard, Q.C. (*Kydd*, with him), for the plaintiff, contended that the issuing of a writ of summons in an action was substantially the act of the party, and not a judicial act within the meaning of the doctrine above referred to, and that the Court could take cognizance of the fact that the cause of action occurred earlier in the day than the issue of the writ.

DENMAN, J.:—I am of opinion that this demurrer must be over-ruled. . . . No doubt, in several of the cases cited, very strong consequences, consequences which one would hardly have expected to follow from any legal doctrine, have been held to follow from the legal doctrine applied in those cases, which, roughly stated, is that Judicial Acts are referred back to the first moment of the day on which they are done. . . . But I am of opinion that the doctrine in question is not applicable to such a case as this. It is a fiction of law, and the doctrine underlying all the doctrines with regard to fictions of law would be violated if we sustained the defendant's contention. A fiction of law exists for the purpose of doing justice in the particular case. If this doctrine were applied, as contended for, to a writ of summons, it could never tend to justice, but always must tend to injustice. It would be arbitrarily saying that wherever a wrong was

committed, the party committing it should have a certain latitude of time in which he might withdraw himself from the jurisdiction of the Court. . . . It may be suggested that the doctrine, though it may appear in some cases to be otherwise applied, is really, when it comes to be carefully looked at, that where there are conflicting claims between subject and subject, the Court can look to the fractions of a day, and that this is a case of such claims; but I do not think it necessary in the present case to lay down the exact limits of this doctrine, and to what cases it is and to what it is not applicable. I think it cannot be applied to this case. . . . It would be giving priority to the writ in order to defeat the object of its being issued. It seems to me impossible that it can apply to a writ of summons for this purpose, and no authority has been cited to show that it does.

WATKINS WILLIAMS, J.:—I am of the same opinion. . . . Here we have admitted on the record a positive averment that the cause of action preceded the writ, and we are asked to rely, in the face of the express averment, on a supposed inference derived from a fiction of law that the writ preceded the cause of action. I do not think there is any authority which compels us so to violate the rules of common sense. I think, therefore, the demurrer must be overruled, and there must be judgment for the plaintiff.

BREE v. MARESCAUX.

Imp. O. 11, *r.* 1—*Ont. O.* 7, *r.* 1 (*No.* 45)—*Practice—Service out of the jurisdiction.*

[June 15.—19 W. R. 858, 44 L. T. 644.
In appeal, 44 L. T. 765.

E. F. Silvester moved by way of appeal from the decision of CAVE, J., at Chambers, for leave under Order 11, r. 1, to serve the defendant out of the jurisdiction, such rule giving the Court power to allow such service where, *inter alia*, "any act or thing for which damages are sought to be recovered was or is done within the jurisdiction." The complaint, the subject of the action, was slander alleged to be spoken by the defendant to the representative of the Royal Mail Steam Packet Company, on board one of the Company's vessels on a voyage to Kingston, Jamaica, and which consisted of a charge of misconduct against the plaintiff, a ship's officer in the service of the said company, and which it was stated in the affidavit in support of the application "was intended to be transmitted and was transmitted to the said company in London." The result of making such charge was the dismissal of the plaintiff from the company's service when he with the vessel arrived in England.

The appeal, however, was dismissed.

DENMAN, J., said:—"The whole question turns upon the meaning of O. 11, r. 1. . . In the present case the action suggested is one which would be brought for the utterance of words abroad resulting in special damage to the plaintiff in England. The act would not of itself be actionable but for the special damage. But would the fact that the special damage occurred in England bring the case within the words that 'the act or thing was done within the jurisdiction?' It appears to me that it would not. The 'act done' would be the words spoken by the defendant out of the jurisdiction, but he did not do anything within the jurisdiction. It is true that something occurred afterwards within the jurisdiction which made the plaintiff's cause of action complete, but it was not the act of the defendant. This construction may seem a technical one, but it appears to me that the case is not brought within the words of the Order."

WILLIAMS, J., said:—"The case would seem to be analogous to that of a wound inflicted by a shot fired from without the jurisdiction, but it is one in which opinions might differ, and on the whole, therefore, I think that the appeal must be dismissed."

The case was then carried to the Court of Appeal, and judgment given on June 22nd, affirming the judgment of the full Court.

In the course of the argument, BRAMWELL, L. J., referred to a case in which he was counsel where MAULE, J., said that the special damage was the cause of action: which case the *Law Times Reporter* notes is probably *Wilby* v. *Elston*, 18 L. J., C. P. 320.

In giving judgment, BRAMWELL, L. J., said: If what the plaintiff complains of is the speaking of the words, that did not take place within the jurisdiction. If on the authority of the case before MAULE, J., to which I have referred, the cause of action is the damage,

the cases show that a man is not liable for the repetition of slander by some one else. . . . Here I cannot see how Marescaux caused the damage. It is said in the plaintiff's affidavit that the slander complained of was intended to be transmitted to England, but I cannot see how this was intended by Marescaux. The plaintiff, therefore, is in the dilemma which I have pointed out. If it is necessary to distinguish the present case from the *Great Australian Gold Mining Co.* v. *Martin*, L. R. 5 Ch. D. 1, that case is distinguishable by the affidavit which was used, and which stated that the secretary of the company was informed and believed that the defendant made in England certain representations whereby the plaintiff company was induced to issue debentures and shares, and incur expenses in England. (L. R. 5 Ch. D. 18). For these reasons I am of opinion that the application must be refused.

BRETT, L. J.:—I am of the same opinion for the same reasons.

COTTON, L. J.:—I have nothing to add.

[NOTE.—*Imp. O.* 11, *r.* 1 *and Ont. O.* 7, *r.* 1, *are virtually identical.*]

DYER V. PAINTER.

Imp. O. 50, *r.* 3—*Ont. O.* 44, *r.* 2, *No.* 384.

[Ch. D. June 24.—W. R. 105.

Upon the death of the plaintiff in an administration action, his widow and executrix, who has thereby become entitled absolutely to her husband's share in the testator's estate, is entitled to carry on and prosecute the action and the proceedings thereon in like manner as the deceased plaintiff might have done if he had not died, by obtaining an order of course at the Rolls, without the necessity of a special application at the chambers of the judge in whose Court the action is pending.

[NOTE.—*Imp. O.* 50, *r.* 3, *and Ont. O.* 44, *r.* 2, *are identical.*]

WILLMOTT V. BARBER.

[Ch. D. June 24.—W. N. 107.

Imp. O. 55—*Ont. O.* 50, *r.* 1, *No.* 428.

Practice—Costs—Discretion of Judge—Costs by way of penalty.

In this case, which is reported 15 Ch. D. 96, an action had been brought for specific performance of an agreement for the sale of land, and the defendant, who was the vendor, brought a counterclaim charging the plaintiff with acts of trespass and waste. Mr. Justice Fry thought that the plaintiff had failed in his claim, and that the defendant had also failed in his counterclaim, and made an order dismissing the claim without costs; and also dismissing the counterclaim, and ordering that the defendant should pay the costs of the counterclaim, and that if the costs of the counterclaim should exceed half the whole costs of the claim and counterclaim the defendant should pay the plaintiff the excess.

The defendant appealed from the latter part of the judgment.

Bagnold (*North*, Q. C., with him), for the appellant, objected to the order as to costs, as being beyond the jurisdiction of the judge. He had dismissed the claim without costs, and then had ordered the defendant to pay some costs beyond the costs of the counterclaim by way of penalty.

Cookson, Q. C., and *T. A. Roberts*, for the plaintiff.

JESSEL, M. R., said that no doubt a judge could not impose costs beyond the costs of the suit by way of penalty. But the order was only wrong in form. What the judge meant to do was to order the defendant to pay half the whole costs of the claim and counterclaim, and he had full power to do that. The order should have been that the claim be dismissed without costs except as thereafter declared, and then a declaration that the defendant should pay half the costs of the claim and counterclaim.

BAGGALLAY and LUSH, L.JJ., concurred.

REAL AND PERSONAL ADVANCE COMPANY V MCCARTHY.

Costs—Defendant—Withdrawal of defence—Costs "so far as they were occasioned by defence."

[Ch. D. July 29.—D. N. 109.

In this case Fry, J., allowed a defendant to withdraw his defence and ordered him to pay the plaintiffs their costs of the action so far as occasioned by his defence (14 Ch. D. 188). The taxing-master in taxing the costs under this

order, disallowed all the general costs of the suit, and allowed those only which were occasioned exclusively by the defendant's defence. Fry, J. agreed with the taxing-master. The plaintiffs appealed.

Cookson, Q.C., and *Creed*, for the appeal.

North, Q.C., and *Speed*, contra, were not called upon.

THE COURT (Jessel, M.R., and Baggallay and Lush, L.JJ.) dismissed the appeal.

LAIRD V. BRIGGS.

Imp. O. 27, *r.* 1—*Ont. O.* 23, *r.* 1, *No.* 278. *Amendment of Pleadings—Alteration of case.*

[Ch. D. July 26.—W. N. 120.

This was an appeal by the defendant from a decision of Fry, J., reported 16 Ch. D. 440, granting an injunction to restrain the defendant from removing shingle from a part of the foreshore at Margate, and refusing the defendant leave, at the trial, to amend his defence, so as to turn a qualified denial of the plaintiff's possession to the foreshore in question, into an unqualified denial of mere possession.

THE COURT (Jessel, M.R., Brett, and Cotton, L.JJ.) held that an amendment ought to have been allowed, and that upon the true construction of the building agreement under which the plaintiff claimed to be entitled to the *locus in quo*, he had no title or estate therein whatsoever, but only a right of entry for the purpose of the building agreement, and on this ground allowed the appeal with costs.

[NOTE.—*Imp. O.* 27, *r.* 1 *and Ont. O.* 23, *r.* 1 *are identical.*]

IN THE COUNTY COURT OF THE COUNTY OF ELGIN.

FRAZER—APELLANT, AND THE INSPECTOR OF LICENSES OF THE COUNTY OF ELGIN, RESPONDENT.

Liquor License Act, Sec. 18.—Locality covered by License.

A licence to sell spirituous liquors under the Liquor Licence Act gives the licensee the right to sell liquors not merely in the hostelry, but also in buildings in its vicinity on the same premises and within the same enclosure.

[St. Thomas, August 17.—Hughes, Co. J.

This was an appeal by an innkeeper, having a licence limited for six months, under the 18th section of the Liquor License Act, his premises being largely resorted to by visitors in summer and shut up during the rest of the year. The premises consisted of a large summer hotel, pleasure grounds, gardens, a dining booth, a bar-room and ice cream saloon. All (except the two last named, which were contiguous to each other) were in buildings separated from the house. Adjoining his premises and leading *into* them, are other pleasure grounds belonging to the Railroad Company of which the appellant was the lessee, which were also used by excursionists in summer time. The appellant sold liquors under his licence in the hotel, and also in the bar-room constituting a separate building at the entrance of and on his own premises adjoining the picnic grounds, claiming that he had a right to do so under his licence. The Magistrate, on complaint of the Inspector, decided that the license was confined to the *hotel*, and convicted and fined him $20, as for selling in the out-of-doors bar-room without license.

The innkeeper appealed to the County Judge.

C. Macdougall, for the appellant.

Stanton, County Crown Attorney, for respondent.

The other facts appear by the following judgment of

HUGHES, Co. J.— This is a question entirely affecting the revenue, and not one of morality or for the suppression of drunkenness. The Inspector of Licences prosecuted here for and on behalf of the public because, as is alleged, the appellant unlawfully sold by retail, liquor in a certain outbuilding erected on the Fraser grounds, at Port Stanley, without having first obtained a License under the Liquor License Act authorizing him to do so, contrary to the 39th section of that Act. The facts are, as I understand them, that the appellant is the proprietor of an hostelry and certain pleasure grounds at Port Stanley, where thousands of pleasure seekers resort during the summer season for recreation, health, and amusement, and is one of those places referred to in the last sentence of the 18th section of the Act. The appellant

does, in fact, hold a license authorizing him to sell spirituous and fermented liquors in and upon "*the premises known as Fraser House in the village of Port Stanley, under a tavern licence as defined by the statutes in that behalf.*"

It must be observed that the words in the licence are general, the definite article "*the*" is not used to designate the house, "*the premises known as Fraser House*" &c., are the words employed; it is limited in duration for it is a license for six months, as being a place largely resorted to in summer by visitors.

The 14th section of the Act limits the operation of every license to *the person* of the appellant, and for *the premises* therein described, to remain valid only so long as he continues to be the occupant of the premises, and the true owner of the business carried on therein. This provision is made for obvious reasons. First, as I take the meaning to be, that the sale shall be restricted to the person, whose character has been duly vouched for as one who may be properly trusted with a licence; and secondly, that the premises are suited to the accommodation of the public, for the purposes for which they are licensed; in proof of this, if we refer to the 9th section we find that the license to sell is granted only upon petition by the applicant to the License Commissioners, and upon the report of the Inspector that the applicant is a fit and proper person to have a licence, that he has all the accommodation required by law, and that the applicant is known to the Inspector to be of good character and repute, so that the character of the applicant and accommodation for the public are prime essentials. The question then arises, how far and to what extent does this license reach, so as to justify the appellant in the sale of liquor within proper and prescribed hours? and should the accommodation be confined or extended as much as possible, according to the necessity of the case? There is no doubt in my mind that he may sell in every room of the dwelling-house, from the garret to the cellar inclusive, if he chooses, all kinds of liquors; he is not confined to the bar-room, although, for purposes of convenience, the holders of licenses, it is presumed, for the most part confine the sale of liquors to bar-rooms; the vital question here is, may he sell outside of the dwelling-house? In other words, what ground is covered by the license? It must be borne in mind that the Act in question is not primarily one for the better prevention of drunkenness, as is the case with the Imperial Act, 35-36 Vict., cap. 94, for, although it puts restrictions upon the persons and provides for the regulation of taverns, it is primarily and ostensibly a "Liquor License Act" with a view to revenue for the Province and the municipalities, and the duties of the Inspector are more pointed to the objects of revenue than they are to the suppression of drunkenness and vice.

This case is not precisely the same in *form*, but it is largely in *principle* like *The Queen* v. *Raffles*, L. R., 1 Q. B. Div. 207. In that case an information was laid against an innkeeper for selling intoxicating liquors *at a place not authorized by his license;* here it is *for selling without a license*—the effect of both is the same. There the license was to sell intoxicating liquors by retail at 1 Blundell Street, Liverpool, and when the license was granted there was adjacent to the house a vacant piece of land in different occupation and ownership, having a frontage on Blundell Street of twelve feet eight inches, and a frontage in another street called Jamaica Street of thirteen or fourteen feet. That vacant land was subsequently leased to the owner of 1 Blundell Street, who then enlarged the house by building on the vacant land, and an entrance was made on Jamaica Street. The whole building was in the occupation of the licensee, and intoxicating liquors were sold in the added part. An information was laid charging that Stedman, the licensee, sold liquor in a place where he was not authorized by his license. The Magistrate decided that the premises were the same. It was held that the license must be taken to mean whatever could be fairly called 1 Blundell Street, and that the Magistrate's decision was not wrong; that if he had held that the addition of a whole street of houses had been made it would have been covered by the licence, the case might be different, but the adding of only twelve feet was immaterial.

In this case I think the premises known as "Fraser House" comprehended what is colloquially intended by the expression *premises, i. e.*, lands as well as houses, and not one house, but the dining booth, the sheds, outhouses, and all the appurtenances within the curtilage, and the appellant's license covers the whole premises occupied by him for purposes for which the li-

cense was undoubtedly granted, that he has as much right to sell on the lawn in front of his house to his guests recreating themselves out there, or in a tent, or in the open air, or to those cooling themselves in a summer-house or under a shade tree on his premises, as he has to do so in his bar-room in the house ; that his license in fact covers the house and premises in his occupation as owner of the "Fraser House" and grounds, which I take to be identical with what is described in the license ; and whilst the law sanctions the retailing of liquors by the glass, and the revenue is satisfied by the appellant's paying for a license for those premises, it cannot be maintained that a prosecution or a conviction can be supported as a breach of the 39th section of the Act, when it is well known that the license he holds was intended to authorize such sale on premises clearly within the intention of all concerned when the license was granted. The appellant does not keep an inn within the ordinary acceptation of the term, for the accommodation of wayside travellers, although the licensing of inns and taverns is primarily for the accommodation of both man and horse. The people who resort thither are, no doubt, most of them travellers, in the sense that they do not belong to the locality, and that they go to and resort there and return from thence by train or carriages ; still it is a place of public resort for recreation, refreshment, and amusement. No one ordinary house would hold all the people who go there, and no one dining-hall would seat them within the hostelry, but in order to obtain more enlarged accommodation, an outside booth or room is fitted up for a dining-hall, and an outside house is also fitted up as a bar-room, *and on the appellant's premises* (if I understand the meaning of the word "premises"). I have no doubt that ordinary tavern-keepers would be fully justified in selling—and do in fact sell liquors—in any part of the premises they occupy, in so far as the license is concerned, and in so far as tavern regulations do not *forbid such sale*, in other places than the bar-rooms of the premises prescribed, and I do not see why this appellant might not do so too. It is a common usage in England for innkeepers under the one license to have a bar fitted up for the higher class of customers to sit down together, and a barmaid to wait upon them, and to open a common tap-room as well for the accommodation of customers of a lower grade in society, who are always more happy amongst themselves, and whose wants are attended to by a waiter ; and I suppose it is lawful for innkeepers in this country to do the same. Were a license required by law to be taken out, authorizing inkeepers to sell victuals or meals by retail, or food or fodder for horses or cattle, in a tavern, on the same terms and conditions and subject to the same restrictions as surround this license, and this appellant were licensed so to sell, "*on the premises known as 'Fraser House,'*" (and there is nothing whatever to hinder the Legislature from passing such an enactment), I think no complaint could be reasonably made, or a conviction sustained, were this appellant to sell such meals in an open booth outside the house, or food and fodder for horses and cattle *in a stable or cattle shed* "*on the premises,*" particularly where many hungry people required meals and thirsty ones wanted drink. The same rule of construction must be applied to both alike, for it is perfectly lawful to sell meals, or liquors, or food, or fodder without restraint, unless the law steps in and requires, as in the case of innkeepers, that there should be a license first taken out or a revenue derived from such traffic. The accommodation of the public is what is insisted upon as one of the essentials in the matter of granting licenses for keeping a tavern, and as the keeping a bar-room on the premises outside the dwelling-house, was so clearly for the accommodation of the great crowds of people who resort to the premises, and so manifestly for the convenience, orderliness, quiet and comfort of those who are either boarders, guests, or invalids, or permanent residents for the season, in this healthful resort ; I think it is placing the license within a too narrow construction to say that the accommodation should be necessarily confined to the dwelling-house, and within the narrowest limit, and that the right to sell under it does not extend to the grounds outside. It has all the name of "*Fraser House*" in common parlance, and a person may be said to go up to "*Fraser House*" when he is at Port Stanley, without even going inside the building which constitutes the hostelry, just as a person may be said to go to the "Stevenson House," or to the "Spring Bank Hotel," at St. Catharines, when he merely goes to the baths on those premises, without even once entering the parts of them which constitute the respective hostelries.

There is another view in which this question may be tested, and from which we may see what may be included within the expression "the premises known as 'Fraser House." It was competent for the appellant to apply or and obtain one of two licenses, (the license by wholesale being now abolished) viz.: a tavern licence such as he has, or a shop license, (see sub-sections 2 and 3 of section 2 of the Act, sub-section 4 is repealed). "A tavern license" must be construed to mean a license for selling, bartering, or trafficing, by retail in fermented, spirituous or other liquors in quantities of less than one quart *which may be drunk in the inn*, ale, or beer house, or other house of public entertainment in which the same liquor is sold. "A shop license" must be construed to mean a license for selling, bartering, or trafficing by retail in such liquors in shops, stores, or places other than inns, ale or beer-houses, or other houses of public entertainment, in quantities not less than three half-pints at any one time, to any one person, and at the time of sale to be wholly removed and taken away in quantities not less than three half-pints at a time. Then if the appellant had opened a shop at the Fraser House, as he might have done, he would be entitled to this shop licence, which would have authorized him to sell those liquors by retail in prescribed quantities, provided that the liquors sold were *not consumed, but wholly removed and taken away from his premises.* Then supposing the removal and taking away consisted in carrying the liquors from the hostelry or dwelling-house to the house where the respondent contends by this prosecution he has no right to sell, I am of opinion, on the authority of decided cases, the appellant might be complained of, and properly convicted for selling illegally, and allowing liquors so sold to be consumed on the premises, and what may be construed as part of the *restricted* or *prohibited* premises for one purpose must be regarded as part of the *licensed* premises for the other purpose. The Interpretation clause of the Act (section 2) gives as the meaning of the expression "Tavern License," viz.: a licence for selling, bartering, or trafficing by retail "in quantities less than a quart all kinds of liquors *which may* (it does not say *must*) be drunk in the Inn, Ale, or Beer-house, or other house of public entertainment in which the same liquor is sold." Now the selling is the act of the licensee, and the drinking is the act of the purchaser—so that if the license be to sell *on the premises* and *to allow to be drunk in the Inn*, &c., the liquor so sold, I cannot see why the inn-keeper may not sell the liquor on the premises to be drunk anywhere the purchaser pleases. I think no one ever doubted the right of an inn-keeper to sell liquor to a passing traveller who might choose to stop at his door and call for a glass of ale and serve it up to him sitting on his horse on the public highway outside his house, because it would be answering the purpose of his calling to do so, nor can I see any reason why customers may not be served in the same way under our License Act in any part of the premises the landlord fits up and uses for the reception and convenience of his customers and guests.

A shop license gives leave to a licensee to sell by retail in shops, stores, or places other than inns, ale, or beer-houses, or other houses of public entertainment, in prescribed quantities, all kinds of liquors which are to be wholly removed and taken away from the premises. I suppose he may sell in his shop or from his cellar or out-house, and the leave to sell is common to the inn-keeper licensee, and the shop-keeper licensee alike (except as to quantities), but the places for drinking of the articles sold (which is to be the act of the purchaser in both cases) is diverse and not common.

I have met with the report of an English case recently, which I am not able to lay my hand upon at present, wherein a person licensed to sell liquors in fixed quantities to be drunk *off the premises*—hired a room at no great distance from his place of business, and there his customers resorted to drink and smoke together;—on complaint, he was convicted of a breach of the License Law, for an evasion of duty or excise payable upon licenses by retail, and the conviction was upheld; for the premises where the liquor was consumed, were held to be within the same curtilage.

The place where the liquor was sold by this appellant was within the same enclosure or curtilage as the dwelling-house or hostelry; (see cases cited *post*); and which for purposes of public convenience and the comfort of his other guests, are so far removed from the house as to prevent its being made a nuisance to them, and still might be regarded as belonging to the hostelry. I think, therefore, it had a

right to be regarded as part and parcel of the premises known as "Fraser House," referred to in the license. It is quite true that were an accusation made against a person for burglariously entering that same building in the nighttime—wherein it is acknowledged the appelt lant sold liquors—a conviction could not follow, because it is not connected with the dwelling-house by a covered in way; but that would be in consequence of special enactment, which is exceptional, and which declares that unless there is a communication immediate, or by a covered in way, with the house, no such building should be deemed part of the dwelling-house. In the absence of any such enactment, the presumption of law would be otherwise. (See cases cited *post.*) At all events, in a case like the present, where the appellant has a license and has paid the duty, and his house largely accommodates the public in every sense of the term, both for eating and drinking, I think the public have no right to make him pay for a second license; nor do I see how, under our License Acts, he either should or why he need take out a licence for such a place as the one for which he was convicted of selling in. Other innkeepers having gardens and pleasure grounds, supply their guests at any place where refreshments are ordered, within their premises, and this appellant had a right to do the same; he had a right to sell liquor on the lawn in front of the house and in the house, or on the verandah outside the house, or in any place in the open air; and I think he had the same right to sell within the curtilage of the dwelling, in any building on the premises, although it is not built close up to the dwelling-house, even if there is no communication immediate between the two, or a covered in way as would be necessary in a case of an accusation for burglary; so that if the appellant had a right to sell liquor, and if it might be consumed in the house or outside, it is no breach of the license for it to be consumed anywhere.

I think the conviction was wrong in point of law and upon the facts; and that the conviction must be quashed with costs, which I fix at $10, besides expenses of summoning witnesses and witness' fees.

Conviction quashed.

(The following authorities were referred to by the learned Judge: *Rex* v. *Clayburn*, R. & Ry. c. c. 360; *Rex* v. *Chalking*, R. & Ry., c. c. 334; 3 Inst., 64; 1 Hale, 558; 1 Mood. c. c. 13; *Rex* v. *Walters*, 1 Mood. c. c. 13; and *Brown's case*, 2 East, P. C., 501, 502; and *Cross* v. *Watts*, 13 C. B., N. S., 239.

LAW STUDENTS' DEPARTMENT.

The Benchers have taken action on the petition for the re-establishment of the Law School, and it is probable that it will be restored in much the same shape as before.

We continue the publication of the Law Society Examination questions. The following are some of those of last Trinity Term:—

CERTIFICATE OF FITNESS.

Smith on Contracts—Statute Law, &c.

A. and B. play at cards, and B. loses $100, for which he gives A. his note, payable to A. or bearer on demand. A. sues upon the note. Has B. a good defence? Give reason for your answer.

A., a carpenter, twenty years of age, agrees, in writing, to build a house for B., and to have the same completed in sixty days, and in default to be liable to a penalty of $5 a day for each day's delay after the sixty days. Default is made. Can B. recover the penalty? Give reasons for your answer.

How far is a husband liable for necessaries supplied his wife? How far can he limit his liability by notice not to trust her?

What is the duty respectively of the Court and jury with reference to the construction of written instruments? Answer fully.

In proceedings in ejectment, under what circumstances can a defendant obtain security for costs?

Under what circumstances can a writ of replevin be issued without a judge's order? What material is necessary?

What is necessary to be done to procure the attendance of the opposite party at the hearing or trial of a civil cause if you desire to call such opposite party as a witness? What is the effect of the non-attendance of the party when the proper steps are taken?

Can you sue a justice of the peace for any-

thing done by him in the execution of his office in the County Court or Division Court? Has he any, and what remedy?

A. calls upon B. and introduces C., whom he states to be an honest and reliable man and worthy of credit to the extent of a couple of hundred dollars (A. well knowing C. to be a man of no means and bad credit). B. sells C. goods, which C. never pays for. B. sues A. for the false and fraudulent representation made by him as to C.'s honesty, &c. Can B. recover? Explain fully, with reasons.

Equity Jurisprudence.

State the principal defences which may be set up to a suit for Specific Performance independently of the Statute of Frauds.

Explain the jurisdiction, (1) at Law, and (2) in Equity, respecting Interpleader.

What is "Mistake of Title," and what relief will be allowed to one making improvements on land under a mistake of title?

Describe the ordinary proceedings in a suit for the administration of the estate of an intestate or testator which may be taken before one of the local Masters in Chancery.

Define the (1) exclusive, (2) concurrent, and (3) auxiliary jurisdiction of equity.

State how far equity will enforce (1) voluntary trust raised by will, and (2) an executory trust raised by covenant or agreement.

Explain how implied trusts are often created by charges made on real estate.

State how far equity will enforce an agreement for purchase which has been entered into for the purpose of acquiring a right to complain of a fraud.

State the order of administration of different properties in the payment of debts and legacies.

Leith's Blackstone—Taylor on Titles.

Can one joint tenant, under any circumstances, compel his co-tenant to account to him, (1) for rent received from the property, (2) for exclusive possession of the property, (3) for timber cut and removed?

In what cases must a person entitled to a distributive share of an intestate's estate bring into hotchpot benefits received by him during the lifetime of the deceased? Distinguish between realty and personalty.

What is the legal signification of the word *month?*

What do you understand by deeds of revocation of uses? Explain fully.

What becomes of land held by a corporation upon its dissolution or extinction? Explain.

Under a contract of purchase which is never completed, the vendee enters into possession. At what time will the Statute of Limitations commence to run in his favour?

What statutory provision is there by which in ejectment the plaintiff is entitled to judgment unless the defendant gives security for costs? Answer fully.

What is the distinction between the necessity for registration of a disentailing deed on the one hand, and of any other conveyance on the other?

Under what circumstances are tenants entitled to emblements?

Under what circumstances will the denial by the tenant of his landlord's title, work a forfeiture of his estate?

EXAMINATION QUESTIONS AND ANSWERS.

Q.—Give instances of justifiable and excusable homicide respectively.

A.—*Justifiable homicide.* (i.) When the proper officer executes a criminal in conformity with his legal sentence; (ii.) when an officer of justice, or one assisting him, in the legal exercise of his duty, kills a person who resists arrest and who cannot otherwise be taken, or who flies to avoid arrest for felony and is killed in the pursuit; (iii.) when a gaoler kills a prisoner to prevent his escape; (iv.) when an officer, in endeavouring to disperse the mob in a riot; (v.) when the homicide is committed in the prevention of a forcible and atrocious crime, as murder, burglary, or robbery.

Excusable homicide. (i.) When a person doing a lawing act without any intention of hurt accidentally kills another; (ii.) wnen, in the course of a sudden brawl or quarrel, a person, to save his own life, kills another who assaults him. (Harris and Tomlinson, Cr. L. 2nd ed. 151-154.)

REVIEWS.

The Law of Registration of Titles in Ontario, by Edward Herbert Tiffany, of Osgoode Hall, Barrister-at-Law, Toronto. Carswell & Co., Toronto.

No one who takes any interest in the legal literature of Ontario can fail to have been impressed and gratified during the last few years by its rapid progress in extent and variety. It is true that we cannot boast of great original works on the fundamental principles of law, no Story or Sugden having as yet appeared amongst us, and it will be generally conceded that our legal writers have shewn wisdom in confining themselves, as a general thing, to the less ambitious, but more immediately useful task of explaining and commenting on the more important chapters of our Provincial Statues, and the cases decided upon them. It is somewhat remarkable that the Registry Act should have remained as long without a commentator, for there is no statute which exercises a wider or more practically important influence, lying as it does at the foundation of the whole conveyancing system of this country. Mr. Tiffany refers in his preface to two previous manuals on registration, but as they date back to 1857 and 1866 and are rarely, if ever, available for reference at the present time, the work now under review is fairly entitled to the distinction of being the first in its special field. We have not space to enter into a detailed criticism of the work before us, but have no hesitation in saying that it will be found of great value by all who are engaged in the practice of conveyancing and searching titles. It consists of full annotations of the Registry Act, R. S. O., cap. III., followed by an appendix of practical forms, a tariff of fees, &c. There is also a brief introduction, giving a condensed account of the origin and development of our provincial system of registration. There is a great deal that is exceedingly dry and formal in this Act, such as the sections relating to the appointment and duties of the registrars themselves, the manner of registering different instruments, &c., but this fact has not hindered the author from giving a full and satisfactory account of them. It is, however, in his tenth chapter, in which he comments on the section coming under the head of "Effect of registering or omitting to register," that Mr. Tiffany has put out most force, and his excellent discussion of the important questions raised by these sections, such as purchase for valuable consideration, and actual and constructive notice, is, we think, sufficient in itself to recommend his work to the favourable consideration of the profession.

CORRESPONDENCE.

Division Courts—Vouchers.

To the Editor of the Canada Law Journal:

Sir,—I was surprised the other day to find that it is the practice in at least one of the Courts of this county, when a note is given to the Clerk for suit, to annex it to the original summons, and for the process server to carry it about in his pocket with other papers until service is effected. This practice strikes me as likely to lead to difficulty. What say you?

Yours, etc.,

Toronto, Sept. 6. Attorney.

[The practice spoken of certain seems open to grave objection. Vouchers of this kind should be kept by the Clerk in the safest place he can find, and that is certainly not the pocket of the person who serves papers, whether he be bailiff or bailiff's assistant. The loss of a promissory note might cause serious difficulty, perhaps entail loss on the Clerk himself, who is certainly not using due care in the preservation of papers left with him. The safest plan would be for the suitor to give to the Clerk a copy of the note and not the original, which, however, should be produced before judgment given. If, however, the note is handed to the Clerk, he should make, or call upon the plaintiff to make a copy of the note to be attached to the original summons.—Eds. L. J.

Law Society of Upper Canada.

OSGOODE HALL.

TRINITY TERM, 45TH VICT.

During this Term the following gentlemen were called to the degree of Barrister-at-Law. The names are placed in the order of merit :—

CALLED WITH HONOURS.

John Henry Mayne Campbell.

CALLED.

George Anthony Watson, John Sanders Macbeth, Horace Edgar Crawford, George Gordon Mills, Jeffrey Agar McCarthy, Charles Miller, Allan McNab, James Scott, Conrad Bitzer, William Elliott Macara, Samuel George McKay, James Brock O'Brian, Frederick Herbert Thompson, Frederick William Kittermaster, Alexander Ford, James Walter Curry, Edward Norman Lewis, Frederick Case, Abraham Nelles Duncombe, William Franklin Morphy.

The following gentlemen who passed their examination in Easter Term, 1881, were also called to the Bar this Term :—

Frederick Faber Harper, Solomon George McGill.

The following gentlemen were admitted into the Society as Students-at-Law, namely :—

GRADUATES.

Hugh St. Quentin Cayley, William Durie Gwynne, Thomas Chalmers Milligan, Alpin Morrison Walton, Douglas Armour, Thomas B. Bunting, Walter Laidlaw, Thomas Joseph Blain, George Washington Field, Samuel Clement Smoke, Henry Herbert Collier, Frederick W. Hill, Charles William Lasby, John Bell Jackson, James Metcalf McCallum, Thomas Edward Williams, George Morton, Frederick Ernest Nellis, Alexander Cameron Rutherford, Frank Henry Keefer, Lucius Quincy Coleman, Henry Thomas Thibley, Joseph Wesley St. John, John Douglas.

MATRICULANTS OF UNIVERSITIES.

Edward W. Hume Blake, Herbert Carlton Parks, Edward Charles Higgins, William H. Holmes, R. S. Smith, John Wesley White, John Paul Eastwood.

JUNIOR CLASS.

William Murray Douglas, George Marshall Bourinot, Thomas Urquhart, Alexander William Marquis, John Bell Dalzell, Osric L. Lewis, Frederick Stone, Alexander David Hardy, Donald James Thomson, Joseph Coulson Judd, Parker Ellis, John O'Hearn, Francis McPhillips, Henry Clay, Robert Casimir Dickson, Arthur Clement Camp, John Carson, Douglas Harington Cole, Thomas Steele, Andrew Charles Halter, Matthew Joseph McCarron, Robert G. Fisher, Charles Meek, W. H. F. Holmes, Paul Kingston, Harry George Tucker, Richard Vanstone.

And the Preliminary Examination for Articled Clerks was passed by William Mansfield Sinclair.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

1881.
- Ovid, Fasti, B. I., vv. 1-300; or, Virgil, Æneid, B. II., vv. 1-317.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History—Queen Anne to George III.
- Modern Geography—N. America and Europe.
- Elements of Book-keeping.

In 1882, 1883, 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

Students-at-Law

CLASSICS.

1881.
- Xenophon, nabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero in Catilinam, II., III., IV.
- Ovid, Fasti, B. I., vv. 1-300.
- Virgil, Æneid, B. I., vv. 1-304.

1882.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum, (B. G. B. IV. c. 0-36, B. V., c. 8-23.)
- Cicero, Pro Archia.
- Virgil, Æneid, B. II., vv. 1-317.
- Ovid, Heroides, Epistles V. XIII.

1883.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum.
- Cicero, Pro Archia.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Heroides, Epistles V. XIII.

1884.
- Cicero, Cato Major.
- Virgil, Æneid, B. V., vv. 1-361
- Ovid, Fasti, B. I., vv. 1-300.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.

1885.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid Bb. I., II., III.

ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a selected Poem:—

1881.—Lady of the Lake, with special reference to Cantos V. and VI.

1882.—The Deserted Village.
The Task, B. III.

1883.—Marmion, with special reference to Cantos V. and VI.

1884.—Elegy in a Country Churchyard.
The Traveller.

1885.—Lady of the Lake, with special reference to Canto V.
The Task, B. V.

HISTORY AND GEOGRAPHY.

English History from William III. to George III., inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek:—

FRENCH.

A paper on Grammar.

Translation from English into French Prose:—

1881.—Emile de Bonnechose, Lazare Hoche.

OR, NATURAL PHILOSOPHY.

Books.—Arnott's Elements of Physics, 7th edition, and Somerville's Physical Geography.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination, to be passed in the third year before the final Examination, shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery; O'Sullivan's Manual of Government in Canada; the Dominion and Ontario Statutes relating to Bills of Exchange and Promissory Notes, and Cap. 117, R. S. O., and amending Acts.

The Subjects and Books for the Second Intermediate Examination to be passed in the second year before the Final Examination, shall be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing, (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law; Underhill on Torts; Caps. 49, 95, 107, 108, and 136 of the R. S. O.

FINAL EXAMINATIONS.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Smith on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Harris's Principles of Criminal Law, and Books III. and IV. of Broom's Common Law, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Smith on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

The Primary Examinations for Students-at-Law and Articled Clerks will begin on the Second Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

The Second Intermediate Examination, on the 3rd Tuesday, except in Trinity Term.

The First Intermediate, on the 3rd Thursday, except in Trinity Term.

The Attorneys' Examination, on the Wednesday, and the Barristers' Examinations, on the Thursday before each of the said Terms.

FEES.

Notice Fees	$1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Attorney's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fees each,	1 00
Fee in Special Cases additional to the above	200 00

The following changes in the Curriculum will take effect at the examination before Hilary Term, 1882:—

FIRST INTERMEDIATE.

Williams on Real Property; Smith's Manual of Common Law; Smith's Manual of Equity; the Act respecting the Court of Chancery; Anson on Contracts; the Canadian Statutes relating to Bills of Exchange and Promissory Notes, and Cap. 117 R.S.O. and Amending Acts.

SECOND INTERMEDIATE.

Leith's Blackstone (2nd edition); Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages and Wills); Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act; Caps. 95, 107 and 130 of the Revised Statutes of Ontario.

FOR CERTIFICATE OF FITNESS.

Taylor on Titles; Hawkins on Wills; Taylor's Equity Jurisprudence; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and the Pleadings and Practice of the Courts.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's Principles of Criminal Law, and Books III. and IV. of Broom's Common Law; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills; the Statute Law and the Pleadings and Practice of the Courts.

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DIARY FOR OCTOBER.

2. Sun..16*th Sunday after Trinity.* Prince Arthur visited Toronto.
3. Mon..Co. Court Terms and sitt. without jury (ex York) begin.
4. Tu..First edition English Bible printed, 1535.
8. Sat..Harrsson, C. J., sworn in, 1875. Co. Ct. Term ends.
9. Sun..17*th Sunday after Trinity.* T. Moss, sworn in Judge Court of Appeal, 1875.
10. Mon..County Court Term for York begins.
11. Tu..Guy Carleton, Gov. of Canada, 1774.
12. Wed...Lord Lyndhurst died, 1863.
13. Thu..Battle of Queenston, 1812.
15. Sat...County Court Term for York ends.
16. Sun..18*th Sunday after Trinity.*
21. Battle of Trafalgar, 1805.
23. Sun..19*th Sunday after Trinity.* Lord Monck, Gov.-Gen., 1861.
24. Mon...Sir J. H. Craig, Gov.-Gen., 1807.
25. Tu...Supreme Court sittings. Battle of Balaclava, 1854.

TORONTO, OCT. 1, 1881.

IN citing the "Rules of Court" scheduled in the Judicature Act, we shall, for the present at least, refer only to the marginal number. This is found to be the most convenient practice and not so cumbersome as a reference first to the order and then to its sub-division.

OF the many well-conducted legal journals in the United States, not the least so is the *American Law Review.* The last number contains a summary, scientific, practical, and illustrative of the law on "the slander of a person in his calling." This is a remarkably good paper, and shows the author, Mr. John D. Lawson, to be a man of original thought and large capacity for analysis, and a sound lawyer. We shall hope to see something further from his pen.

SIR GEORGE JESSEL, the late Master of the Rolls, having been appointed to the Court of Appeal, has been succeeded by Mr J. W. Chitty, Q. C., M. P. for Oxford. Mr. Chitty is the son of the late Mr. Thos. Chitty, of the Inner Temple. The name of Chitty has been, in the profession, all over the Anglo-Saxon world, a household word, and, it is almost as well known to the general public in England, in the person of the new Judge, by reason of his having been for many years umpire at the Oxford and Cambridge boat races. Mr. Chitty is a young man, comparatively, for the English Bench, having been born in 1828. The appointment has been very well received by all classes.

THE *Albany Law Journal* reports the case of *Thompson* v. *United States*, decided in the Supreme Court, in which it was held that proceedings in mandamus against a municipal officer to compel the performance of an official duty do not abate by the expiration of the office of the defendant, when there is a continuing duty irrespective of the incumbent, and the proceedings are undertaken to enforce an obligation of the corporation or municipality to which the office is attached.

IT is probable that the recent disastrous fires will be productive of some litigation. Any legal light upon the lurid subject will be of use. In *Kippner* v. *Biehl* (24 Albany L.J. 192,) it appeared that the defendant set a fire in his stubble field. Before doing so he plowed three times around the field. At night he, as he supposed, extinguished the fire. He did not do so, but unknown to him, the fire smouldered in a slough and revived, and two days afterwards extended to plain-

tiff's premises two miles away, and burned property of plaintiff. No agency intervened to spread the fire except the wind, which changed its directions, with some increase in force. *Held*, that a verdict for plaintiff in an action against defendant for the loss of the property burned was proper.

IN these days when the plea of insanity is so commonly set up in criminal cases, it will be instructive to note that a new system of imprisoning insane homicides has lately been applied in France on a limited scale, with much success. We are told by the *Kentucky Law Journal* that—

"No man can be acquitted of a crime on account of his insanity, unless, through his counsel, he pleads his insanity. This throws upon him and his counsel the responsibility of accepting the issue—sane or insane. If he be acquitted because of his insanity, he is confined, not in a common penitentiary (for his confinement is not intended for punishment) nor in an insane asylum, subject to b discharged upon the ready certificate of a physician; but he is imprisoned, at all events for a *fixed time*, and is subjected to medical treatment, but, under no circumstances, to a doctor's discharge. Nor is he subjected to hard labour nor to the debasing *regime* of a common jail. The period of confinement is scaled according to the nature of the offence charged, but in no case is proposed to extend over the prisoner's whole life. If during the prisoner's life his term of imprisonment should expire, he can be released only after his insanity is positively established by evidence to the satisfaction of a number of inquisitors selected with a view to perfect freedom from the influence of the prisoner and his friends. It is the duty of the attorney for the State to oppose the discharge. We suggest this as a tested mode of treating insane homicides, which seems rational, just, and practicable. It appears to compromise fairly between the rights of society and the rights of the insane. And, what is practically of great importance, it does not so shock our humane feelings as to make it distasteful to the people, and, therefore, impossible of application."

The last number of the *Criminal Law Review* contains a long article on the judicial problems relating to the disposal of insane criminals, which also speaks of the same subject.

BANKRUPTCY REFORM IN ENGLAND.

Lord Sherbrooke (Robert Lowe) has written an article in the *Nineteenth Century* discussing the vexed question of Bankruptcy Reform in England. He says, "The plan of trusting the property of bankrupts to officials has, I blush to say, turned out a complete failure." The estate was "an object of plunder and peculation." He adds, "I will not stop to inquire by what abuse of patronage it came to pass that persons chosen by high authorities from a learned and honourable profession, should have been unequal to withstand this not very trying temptation. It puts one in mind of the King of England who said, 'I know not which of my lawyers to appoint, for on my soul they be all rogues.'" As we understand it, neither in England nor in Canada have official assignees been taken from the ranks of the profession, so that in this respect the writer is wide of the mark. Mercantile men, broken-down politicians, so-called "conveyancers," were the class in this country from which most of these persons were taken; and though, of course, the pamphleteer had no reference to Canada, the language, though strong, is no stronger than was applied here to official assignees (with some few exceptions) very generally, before they were with one accord swept out of existence. Lord Sherbrooke advocates doing away with the bankruptcy laws altogether, but with a provision for lessening the period of limitation for debts. He thus concludes a most trenchant article: "First-born of things

divine, Equality may be a good thing. But even gold may be bought too dear, and I cannot help thinking that Equality becomes a curse when, in order to attain it, you are called upon to forfeit to strangers who have no claim at all, the very thing which it is desired to equalise. . . . It is better that debts should be paid unequally than that the property should be destroyed in the effort to ascertain an equality which yields a purely metaphysical and imaginary satisfaction to the thirsty debtor."

OUR NEW PROCEDURE.

A perfect system of legal procedure is one which, without inflicting injustice upon the parties to a suit, enables them with the least possible preliminary work to try the issues upon the merits.

Perhaps the procedure at common law, as earliest known to us, in a country of few wants and small private means, was almost perfect. The parties came before the Court, and the counsel either stated to the proper officer, or themselves handed to such officer the pleadings in the suit, each waiting to see the pleadings of the other; and demurrers, if such existed, were settled upon the spot by the presiding judge. It is apparent that the common law system, by which only single issues could be tried and no set off or counter claim allowed, while suited to primitive times would be totally unsuited to a country possessing great wealth, or to suits of an intricate nature.

The legal mind without wide culture almost invariably becomes narrowed and contracted, and disposed to attach great importance to technicalities, and hence the many refinements, and we may say pitfalls, that attached to legal procedure till within recent years, when lawyers, as well as others, ceased to be insular—if we may so use the term in its larger sense—and have extended their knowledge beyond the immediate wants of their profession. None now share the opinion of Blackstone, who thought that the laws of England were as nearly as possible perfect at the middle of the last century. Some of the supposed excellencies so fondly referred to by him have long since been cast off or become obsolete.

Our system of Equity had no doubt an ecclesiastical origin, and was designed to redress frauds and hardships that could not be well reached by common law; and while on the whole discharging its peculiar functions with success, has always, to a greater or less extent, shared the unpopularity of its origin, and, until late years, at least, was not a popular Court. Its introduction into this Province was not without misgivings, notwithstanding the gross and flagrant wrongs that could not be redressed without its intervention, and many can still remember that sturdy iconoclast, William Lyon McKenzie, prophesying many ills that would follow its introduction. This Court, however, from the legal attainments and good sense of the judges who have framed its procedure, may be said to have outlived, or rather lived down the popular prejudice attending the word "Chancery." These judges, in the discharge of their duties, have woven a procedure adapted to our wants, and designed in a high degree to elicit truth. Courts of Common Law have been more conservative and more disposed to follow the strict wording of statutes than Courts of Equity, which have followed the spirit of the statute rather than the statute itself. Witness the construction put upon the Statute of Frauds with reference to the sale of lands when the purchaser has gone into possession. We may instance the effect of an assignment of a chose in action as construed originally in each Court. The procedure of Courts of Equity was their weak point. It was cumbersome, illogical, and singularly technical. The examining of witnesses by means of interrogatories was a

glaring defect, though designed to enable the Court to apply properly the facts inasmuch as the Judge did not see the witnesses and hence was unable to eliminate the wheat from the chaff of a mass of evidence laid before him. The Judges of the Court of Chancery in this Province, however, quickly discerned the weak points of the English procedure and with the best results.

It was not unnatural, under all the circumstances attending the introduction of the new Act, that Chancery procedure should have prevailed in its framing. In truth the Court of Chancery seems in a sense to have swallowed up the other Courts, for now the doctrines of Equity apply in case of any variance between Common Law and Equity, and the new procedure is in effect that of our late Court of Chancery. The issues will no longer be between two parties only, nor will the litigants be confined to one issue, (in this respect unlike the former procedure in Equity). The aim of the Act is that every right or obligation arising out of one transaction shall be settled in one suit and that all the parties interested in any way in the result may be brought before the Court.

Another marked feature is the counter claim. Common Law Courts have been enabled to deal with set-offs, and Courts of Equity have allowed them, if in contemplation of the parties in the transaction that gave rise to the suit; but the innovation of a counter claim has been hitherto unknown in the procedure of any Court of Justice of English origin, unless indeed it may have been known in some American Court under some of their codes. When, however, the working out of such a claim involves an injustice to the plaintiff or is undesirable, the defendant may be prevented from setting it up, leaving him to his action. Another feature of the Act, previously alluded to, is that the doctrines of Equity when at variance with the doctrines of Common Law now prevail, but in matters of practice unless defined by a Rule of Court that practice prevails which seems to be the best. In the case of *Newbiggins-by-the-Sea Gas Co.* v. *Armstrong*, W. R. 1879, 203, the Master of the Rolls adopted the practice of the Common Law rather than that of Equity for the reason stated. The defendant may also under the new procedure allege that while he may be liable to the plaintiff still some other party is the person who ought in future to satisfy the plaintiff's claim, and such person may be brought before the Court and be made a party. An instance of the hardships under the old procedure of a defendant not being able to bring such a party before the Court is afforded in the case of *Baxendale* v. *The London, Chatham and Dover Ry. Co.*, L. R. 10 Ex. 35, where the costs of contesting a claim for damages could not be recovered from the party who really should have contested the claim. It ought perhaps also to be pointed out that subject to certain exceptions and to the right of the defendant to apply, the plaintiff may join as many causes of action as he desires in his statement of claim, following the previous practice of Common Law, and unlike the practice of the Court of Chancery, where a bill would be demurrable for multifariousness; and that all allegations of the plaintiff in his statement of claim, following the old Chancery practice and not the English Judicature Act, must be proved unless admitted by the plea or statement of defence. We are not prepared, however, at present, to admit that in this respect the procedure which has been adopted is the best. It is very easy to see the great and unnecessary expense and delay that must often ensue. Our act has been mainly based on the English Judicature Act, and we much doubt the wisdom of departing from it in this matter and following it in others of more questionable advantage. Where is the sense of compelling a plaintiff to prove a number of things which the defendent never intends to contest. The old system of pleadings at Common Law may have had its defects, but there was much

satisfaction and a great saving of time and money in having the question actually in dispute clearly defined by pleading to a distinct and acknowledged issue. The allowance of a counter claim and the power to bring in a third party and to make such persons parties is a change which we fear may add largely to the ordinary delays of an action and the expenses of the plaintiff. If this danger can be avoided no doubt the existence of these powers will enable the court to administer justice more efficiently than has been the case in many cases at Common Law. Ample powers of amendment in adding parties are also allowed, and the name of a sole plaintiff may be changed for that of another by an application to the Court upon proper grounds, and no doubt with the consent of the person whose name is substituted as plaintiff.

But it is scarcely worth while to refer to the Act in detail, when our readers can obtain all that we can state from either of the recent publications of Mr. Maclennan or of Messrs. Taylor & Ewart. These books will doubtless be the *vade mecum* for the profession, as Harrison's Common Law Procedure Act has been for the past twenty years. It is almost a pity that both were written, and that one work was not prepared containing the excellencies of both. Both works appear to be accurate, and so far as the annotations upon the Act are concerned about equally full, and no lawyer ought, or can well be without both, the one being in many instances a supplement to the other. Mr. Maclennan's book is the most handy for reference, though that of Messrs. Taylor & Ewart is, in some respects, fuller, and goes beyond the actual requirements of a simple text book upon the Act in question, in that it discusses subjects not really necessary for the elucidation of the text of the Act and rules. The subjects discussed, however, are of great interest to the profession. We may particularly instance the remarks upon the statutes relating to married women owning separate estate, which express the present law upon the subject in apt and concise words. The question of counter claims, too, is fully discussed—a subject novel to the profession, and likely to prove a stumbling block to many. The question of parties is fully discussed in both works, and this, too, will be a subject of great interest under the new Act to those whose practice was mostly at Common Law. Neither of them refers at any length to the new system of pleadings. Perhaps both might have enlarged upon this with advantage. It may be pointed out that good pleading will not be a lost art, as many, no doubt, will find to their client's expense. It is as necessary as it ever was to set forth all the facts that are required to enable a plaintiff to succeed in his action, and the omission of such facts from the plaintiff's statement will as surely lead to a successful demurrer as of old. A good work on pleading under the new procedure is the grea want of the profession here and in England at the present day, and until we have this the successful framing of statements of claim or defence will be a work of much care, and require much thought. Cases do arise where no resort can be well had to any work on pleading, but a new work on the principle of Bullen & Leake will be of great assistance, and particularly so if it can embrace a number of forms of pleadings in a class of cases hitherto known as equity cases. The work of Taylor & Ewart also has very useful chapters on Partition, Mortgage, and Administration suits, which will be of great service to the profession. Both books contain the Chancery orders, especially as excepted in the Act, and which still remain in force. An appendix to Mr. Maclennan's work contains the general orders of the Court of Appeal, and some valuable annotations thereon; and this is followed by an appendix embracing a time table under the new Act, a most valuable aid to the memory of the practitioners.

It is not now worth while offering any ob

jection as to the necessity for this act, and it it is too soon to predicate its success. Since the introduction of the Administration of Justice Act, almost every difficulty relating to the conflict between law and equity has been removed. The old procedure, it is true, was in some respects unskilful and composite, but it had become well understood, and worked smoothly. The new procedure is in theory more perfect, and may ultimately be an improvement upon the old procedure; but some time must elapse before it will become familiar to us, and in the meantime there will have been much confusion and expensive litigation. It is unfortunate that this expense will fall heavily on those who will be sufficiently taxed without it. This, however, cannot now be helped, and it remains for us all to do the best under the circumstances, and we trust that history may record that though in some respects imperfect, and for a time causing confusion, it was on the whole a step in the right direction.

SELECTIONS.

ALMANACS AS EVIDENCE.

In *State* v. *Morris*, 47 Conn. 179, a trial for burglary, for the purpose of showing that the offence was in the night the State was permitted to introduce in evidence a copy of an almanac. The court said: "There is no error in this. The time of the rising or setting of the sun on any given day belongs to a class of facts, like the succession of the seasons, changes of the moon, days of the month and week, etc., of which courts will take judicial notice. The almanac in such cases is used, like the statute, not strictly as evidence, but for the purpose of refreshing the memory of the court and jury." In *Munshower* v. *State*, Maryland Court of Appeals, October, 1880, 2 Cr. L. Mag. 320, an almanac was admitted to show the time of the rising of the moon on a given night. The court said: "The precise periods at which the sun and moon will rise or set in any particular twenty-four hours in the future, are as certain and as capable of exact mathematical ascertainment as is the occurrence of the day in which such rising or setting shall take place. Courts have received as evidence weather reports, reports of the state of the markets, prices current, and insurance tables, tending to show the probable duration of human life, though these are records which are not capable of mathematical demonstration, which cannot be tested by any certain law, and which may or may not omit the record of changes which have actually taken place. But an almanac forecasts with exact certainty planetary movements. We govern our daily life with reference to the computations which they contain. No oral evidence or proof which we could gather as to the hours of the rising or setting of the sun or moon could be as certain or accurate as that which we may gather from such a source." In *Sutton* v. *Darke*, 5 H. & W. 647, Pollock, C. B., said, *obiter*: "The almanac is part of the law of England. In *Regina* v. *Dyer*, 6 Mod. 41, it is stated that all the courts agreed it was; but it does not follow that all that is printed in every printed almanac is part of it; as for instance, the proper time of planting and sowing. Also in *Brough* v. *Perkins*, 6 id. 81, it is said that the almanac is part of the law of England; but the almanac is to go by that which is annexed to the common prayer book. Looking at that, I find it says nothing about the rising or setting of the sun, and I rather think that any information on that subject is quite recent." So Taylor (Ev., 1230) says: "The hour at which the moon rose is a fact, and it can fairly be argued upon the general principles of the law of evidence, that the best evidence of that fact is the testimony of some one who observed its occurrence. Books of science are generally not evidence of the facts stated in them, although an expert may refresh his memory by their use." In *Collier* v. *Nokes*, 2 C. & K. 1012, the court held that although they would take judicial notice of days, they would not of hours, as of the hours of sunrise or sunset. In *Allman* v. *Owen*, 31 Ala. 167, it was held that courts will judicially take cognizance of the coincidence of days of the month with days of the week, as disclosed by the almanac.

Wharton says (Ev., § 282) that a judge "may refer to almanacs" So says Best. Now if the judge may turn to an almanac to satisfy himself when the sun set on a particular day, why may not the almanac be put in

evidence to satisfy the jury of the same fact?

In *Sisson* v. *Cleveland, etc., R. Co.*, 14 Mich. 497, it was held, Cooley, J., giving the opinion, that newspaper reports of the state of the markets are receivable in evidence. The learned judge remarked: "Courts would justly be the subject of ridicule if they should deliberately shut their eyes to the sources of information which the rest of the world relies upon, and demand evidence of a less certain and satisfactory character." The reason in favour of the mathematical demonstrations recorded in the almanacs is much stronger than that in favour of the comparatively inexact and discordant reports of newspapers, dependent solely on hearsay.

In speaking of books of exact science, Wharton says (Ev., § 667): "The books containing such processes, if duly sworn to by the persons by whom they are made, are the best evidences that can be produced in that particular line. When the authors of such books cannot be reached, the next best authentication of the books is to show that they have been accepted as authoritative by those dealing in business with the particular subject."

In *Morris* v. *Hanner's Heirs*, 7 Pet. 559, it was held that although historical works are evidence of ancient occurrences, which do not presuppose the existence of better evidence, yet if the facts related by a historian are of recent date, and may fairly be presumed to be within the knowledge of many living persons, then the book is not the best evidence within the reach of the parties. But there is a great difference between matters of historical difference and mathematical certainty; between the accounts of the late civil war by Mr. Jefferson Davis, or Mr. Pollard, on the one hand, and Gen. Badeau or Gen. Sherman on the other, and the tables of the tides, an almanac, or the multiplication tables. We agree with the annotator of the Maryland case in the *Criminal Law Magazine*, that "we govern our daily life by reference to the computations of the almanac, and these computations are more satisfactory to us than the computations of persons who have actually observed the events predicted by such computations. The world at large regards the statement of an almanac in regard to the hour of sunrise as more certain and satisfactory than the recollection of individuals. A rule which would exclude the evidence of an almanac is too narrow and technical to find favour in modern jurisprudence" It would be almost impossible, in a great majority of cases, to prove, by human testimony, the precise hour of the rising or setting of the sun or moon on any particular day a number o years, or perhaps even a few months, ago. To ascertain an individual who happened to observe and note it, would be like hunting for a needle in a haystack. If the English judges are determined to wait until the church shall recognize the fact that science has predicted these occurrences for many years in the past, and shall conform her prayer book accordingly, they are welcome to do so, but for us a Poor Richard's Almanac is much better practical evidence on such subjects than the prayer book. The church has always been slow to accept the demonstrations of science; witness the cases of Gallileo and Columbus Perhaps the English judges may regard a scientific discovery several centuries old as "recent," but it seems old enough for acceptance by courts of justice without waiting for the bishops. A knowledge of the times of the rising and setting of the sun and moon may be of no consequence to the church, but it frequently is important in worldly affairs, and laymen will take the most convenient and certain means of acquiring it.—*Albany Law Journal.*

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

September 17.

WILSON v. BROWN.

Promissory note by firm of solicitors—Amendment.

The plaintiff lent money to H., who procured B., one of the defendants, who were known to the plaintiff as a firm of solicitors, to sign the firm name to the note jointly with him without the knowledge or consent of his partner. The defendants had done business with a Bank, agreeing therewith to recognize each others's right to sign mercantile paper, but the plaintiff was unaware of this when he took the note. It was proved that the defendants had a contract for the construction of a government work.

Held, that the plaintiff could not recover against the defendants; but that there was no reason, save the technical objection to the constitution of the record, against his recovering against B., who had signed the note, and that the record should have been amended by striking out W.'s name from the record.

A verdict had been entered for defendants in the County Court, and a rule *nisi* to set the same aside was refused.

Held, that there was no power in this Court to make the above amendment; but the appeal was allowed so far as to direct the granting of a rule *nisi*, upon a return of which the amendment might be made in the Court below.

GIBSON v. MCBRIDE.

Conflicting evidence—New trial refused—Appeal.

Where there was conflicting evidence, and the Court below had discharged a rule for a new trial, granted on affidavits, and on the ground that the verdict was against law, evidence, and the weight of evidence.

Held, that this Court could not interfere.

GAUGHAN v. SHARPE.

Prayer for general relief—Effect of—Relief not specially prayed for.

If the allegations in a bill state a case entitling a party to relief, he may under the general prayer have it, though he may have prayed specially for other relief; but a plaintiff cannot take advantage of the ambiguity of his own pleading so as to claim upon facts stated in the bill a relief entirely foreign to the scope of the bill.

A creditor's bill prayed that the proceeds of an insurance policy which had been effected by the deceased for his first wife and children, should be subjected in the hands of the executors to the payment of the plaintiff's claim, and that the executors might be restrained from paying over the money. The Court below overruled a demurrer thereto, but under the general relief prayer granted administration.

Held, reversing the decision of the Court below, that the demurrer should have been allowed, and that the plaintiff was not entitled to the administration decree.

PROCTOR v. AMBLER.

Statute of Frauds—Goods over £10—Delivery of—Verdict against evidence.

A delivery and acceptance of goods exceeding the value of £10 in order to satisfy the Statute of Frauds must be in pursuance of a contract of sale. Where, therefore, the plaintiff, an outgoing tenant of premises leased from the defendant, handed the key to the defendant,

Held, that this was not a delivery or symbolic delivery of the goods upon the premises to satisfy the statute.

Where the Court was satisfied on the evidence that the verdict for defendant was wrong, and that it was not merely against the weight of evidence, but against the evidence, the appeal was allowed and a new suit directed.

REID v. HUMPHREY.

Alteration of negotiable instrument—Onus of proof.

While a promissory note was in the hands of the plaintiff's testator, the name of the payee, D.P., was improperly added thereto as a maker.

Held, affirming the judgment of the Court below (MORRISON, J., dissenting) that it was such a material alteration as to vitiate the note; and that this would have been so even if the name had been placed there by D. P., or by his authority as an additional maker of the note.

Held, also, that the onus would have lain upon the testator, if alive, to acconnt for the placing of the name where it was, and to rebut the inference arising from the alteration, and the fact of his death did not shift the onus.

FREED v. ORR.

Judgment against executor—Execution—Sale under—Validity of.

Lands are liable to be sold under execution on a judgment against an executor or administrator only for a debt of the testator or intestate, and a sale of the same cannot be upheld if, in fact, the judgment were not recovered in respect of a debt of the deceased. But when a judgment is recovered against a living person, or against executors for a debt of the testater, the sale of land under the writ valid on its face, and authorized by the conclusion of the record, passes a good title thereto, and the debtor could only recover the money under the execution in case of a reversal of the judgment for error on the record.

CHAMBERS.—Q. B. and C. P. DIV.

Mr. Dalton.] [Sept. 20.

TRUST & LOAN CO., v. HILL.

Land, action to recover—Judgment—Rule 322—Admission.

In an action for the recovery of land the plaintiff may obtain an order to sign final judgment under Rule 322 upon an admission of the defendant in pleadings or on his examination.

Marsh, for plaintiff.

Mr. Dalton, Q. C.] [Sept. 20.

LAIDLAW v. ASBAUGH.

Ejectment—Issue—Notice of trial—Rule 494.

A writ in ejectment was served on 15 August, 1881, and an appearance entered after the 22nd of the same month.

Held, that the plaintiff need not file a statement of claim under the new practice, and a notice of trial served immediately after the entry of the appearance was regular, the cause being then at issue.

Shepley, for plaintiff.

G. B. Gordon, for defendant.

Mr. Dalton.] [Sept. 22.

FRIENDLY v. CARTER.

Notice of trial—Countermand.

Where a notice of trial has been given it cannot be countermanded by either party.

H. W. M. Murray, for plaintiff.

Perdue, for defendant.

Mr. Dalton.] [Sept. 22.

LUMSDEN v. DAVIES.

Notice of trial—Time—Agent, service on.

Where a notice of trial is served upon the Toronto agents of a solicitor he is not allowed two days additional time, as he was under the former practice.

Alan Cassels, for defendant.

G. B. Gordon, for plaintiff.

Mr. Dalton.] [Sept. 22.

SCHNEIDER v. PROCTOR.

Issue—Joinder—Notice of trial.

A cause is at issue where a joinder of issue has been filed or where three weeks have elapsed after the statement of defence has been delivered.

A notice of trial served before either of those events has happened was held irregular and was set aside.

I. Campbell, for defendant.

Drew, Q. C., for plaintiff.

CHAMBERS—CHAN. DIV.

Boyd, C.] [Sept 5.

HOPKINS v. HOPKINS.

Partition under G. O. 640—Adverse title—Costs.

A partition matter. A defendant on reference before a master claimed title to the land in question.

This was a motion by plaintiff for leave to file a bill. It appeared in evidence that the plaintiff was aware prior to the taking of proceedings before the Master that the defendant in possession claimed the land.

Nesbit, for the motion.

J. H. Macdonald, *contra*, cited *Bennetto* v. *Bennetto*, 6 P. R. 145; *Macdonnell* v. *McGillies*, 8 P. R. 339.

BOYD, C., dismissed the application, and ordered the plaintiff to pay the costs of proceedings in the Master's office, and of this application.

Boyd, C.] [Sept. 26.

AITKIN v. WILSON.

Reference—Change of—Ontario Judicature Act—Effect of—Practice.

The decree directed a taking of partnership accounts. Reference to Master at Toronto. A motion before Mr. STEPHENS to change the reference to the Master at Barrie was refused On an appeal:

The CHANCELLOR, after ascertaining from the Master that the earliest time free for appointments in his office was in November, changed reference to Barrie, stating that but for this he would not have done so; that in regard to the cases cited the O. J. Act had changed the principles on which they were decided. The policy of that act is to decentralize business and send local matters to local Masters; that here the business of the partnership had been carried on in the county of Simcoe, and the parties reside there, so that the matter should properly come before the Master of that county. Order made changing reference; costs to be costs in the cause.

Mulock, for the defendant, appellant.

Hoyles, *contra*, cited *Macara* v. *Gwynne*, 3 Gr. 310, and *Noad* v. *Noad*, 6 P. R. 49.

REPORTS.

RECENT ENGLISH PRACTICE CASES.

(Collected and prepared from the various Reports by A. H. F. LEFROY, ESQ.)

RICHARDS v. CULLERNE.

Imp. Jud. Act, 1873, *sec.* 89—*Ont. Jud. Act*, *sec.* 77.—*County Court—Committal fo disobedience.*

[Q. B. D., July 27—W. N. 120.

In this case a County Court had made in the course of an action an order on the plaintiff for production of documents, which order was disobeyed. The defendant applied to commit him, but the judge refused to commit him, being of opinion that he had not jurisdiction to do so. The defendant obtained a rule *nisi* for a mandamus, which was discharged by Denman and Williams, JJ., on the ground of an omission to produce certain exhibits, without any opinion being given on the merits.

THE COURT (Jessel, M.R., and Brett and Cotton, L. JJ.) held that the County Court had jurisdiction to commit, and that the case was governed by *Martin* v. *Bannister* 4 Q. B. D. 491; the fact that the order in that case was final, and in the present case only interlocutory, not making any difference.

[NOTE: *Imp. Jud. Act*, 1873, *sec.* 89, *and Ont. Jud. Act*, *sec.* 77 *are identical.*]

BURROWES v. FORREST.
FORREST v. BURROWES.

Action—Reference to arbitration—Enforcing award.

[M. R., July 22—W. N. 120.

All matters in difference between the parties to these actions were referred to an arbitrator who made his award, whereby (among other

* It is the purpose of the compiler of the above collection to give to the readers of this Journal a *complete* series of all the English practice cases which illustrate our present practice, reported subsequently to the annotated editions of the Ontario Judicature Act, that is to say since June, 1881.

things) he ordered the payment of a sum of money to Burrowes by Forrest.

The award had not been made a rule of Court.

H. G. Deane now moved on behalf of Burrowes for an order enforcing the award.

THE MASTER OF THE ROLLS, expressing an opinion that it was desirable to assimilate the practice of the Chancery and Common Law Divisions, made the order as asked without requiring the award to be made a rule of Court.

SCHOTT V. SCHOTT.

Married woman suing by her next friend—Authority—Security for costs.

[July 29.—W. N. 125.

Motion on behalf of defendants, a husband and the wife's trustee under a separation deed (the trustee having refused to give his consent to the wife's proceeding) that the action, which had been commenced by the wife, suing by her next friend for the payment of unpaid instalments of maintenance money under the deed might be dismissed, on the ground that the plaintiff had never given the alleged next friend any authority to act; or that the next friend might be ordered to give security for costs, on the ground that he was not a householder, and that a witness had ascertained upon inquiry that he had no visible means of paying costs. In defence the next friend deposed that he was in a position to pay any costs that he might be ordered to pay, but as to his authority he said nothing.

THE VICE-CHANCELLOR said it was new to him that a next friend should be interrogated as to his authority. If a wife were to come forward and say she had not given any authority, that would be another thing. But until the wife said this, or until some one said this and proved it, the case must go on. Neither could he put the alleged next friend on the terms of giving security for costs. The defendant, the husband, was the last man who should make this application, having deprived his wife of the means of subsistence. If he could answer the case he had the remedy in his own hands, for if he should succeed, he might pay himself the costs out of the annuity.

Motion refused; costs to be costs in the cause.

JENNINGS, APP.; JORDAN AND PRICE, RESPTST.

Imp. O. 16, r. 7 — Ont. O. 12, r. 7 (No. 95.) Mortgage—Consolidation—Parties—Trustees.

[H. of L., August.—W. V. 127.

Appeal from a decision of the Court of Appeal, reported *sub. nom. Mills* v. *Jennings*, 13 Ch. D. 639.

THE LORDS affirmed the decision with costs, with the variation of reserving liberty for the respondents or either of them, or for any of the *cestuis que trust* under the deeds of the 3rd of December, 1838, and the 6th May, 1868 respectively (in case of redemption of the mortgaged premises included in the decree by the respondent Jordan) to apply to the Chancery Division for the addition to the decree of any further accounts and directions consequential thereon, which by reason of such redemption he Court may think just.

[NOTE.—*Imp. O. 16, r. 7, and Ont. O. 12, r. 7 are identical.* Mills v. Jennings *is cited at some length by Taylor & Ewart, (Jud. Act), p. 187.*]

AUSTEN V. BIRD.

Imp. O. 16, r. 15.—Ont. O. 12, r. 17 (No. 105.) Death of sole plaintiff—Order to revive—New defendant—Service of writ.

[M. R., Aug. 5.—W. N. 129.

This action was commenced on the 27th of July, 1880, by a sole plaintiff against a sole defendant. The plaintiff died on the 26th of December, 1880, after delivery of statement of claim, and on the 11th of February, 1881, his executors obtained a common order to revive. The plaintiffs had obtained leave to add a new defendant, but the order was not drawn up.

Cozens-Hardy applied under Order xvi. r. 15, for directions as to service, the only plaintiff named in the writ being dead. He referred to *Re Wortly, Culley* v. *Wortley*, 4 Ch. D. 180.

The Master of the Rolls directed copies of the original writ and the order to revive and the order adding the new defendant to be served upon him.

[NOTE.—*Imp. O. 16, r. 15, and Ont. O. 12 r.*

17, are identical, excepting that the former requires the plaintiff to file an amended copy of the writ of summons, which our order does not do.]

SALT v. COOPER.

Imp. Jud. A. 1873, *sec.* 24., *subs.* 7, *O.* 42.—*Ont. Jud. A., sec.* 16, *subs.* 8, *O.* 38.—*Equitable execution—Appointment of receiver after final judgment—"Cause or matter pending."*

[Ch. D., C. of A., Dec. 21, 1880,—
30 L. J. R., 509.

In this case in the court below, the M. R. held that after final judgment in an action a receiver may be appointed (although the writ contains no claim for a receiver) without the issue of any fresh writ, so long as the judgment remains unsatisfied, the action being in such a case "a cause or matter pending" within the meaning of the Jud. Act, 1873, sec. 24, sub-sec. 7, and that Imp. O. 42. (Ont. O. 38), does not at all affect the question.

Now on appeal to the Court of Appeal the above decision of the M. R. was affirmed.

[NOTE.—*Imp. J. 7., A. 1873, sec. 24, subs. and Ont. J. A. sec. 16. subs. 8 are identical. The case of Salt* v. *Cooper, before the M. R. is cited by Taylor & Ewart at p. 335 of their work on the Jud. Act. The case involved a further point arising from the prior appointment of a receiver by the Court of Bankruptcy, and the judgments are mainly concerned with this. The Lord Justices of Appeal, however, allow the subsequent equitable execution would have been good, but for this.*]

WATSON v. CAVE.

Appeal—Withdrawal of withdrawal.

An appellant wrote a letter on Jan. 26, 1881, proposing to withdraw his appeal, and asked the respondent's consent to such withdrawal, which was given. Two days afterwards he gave notice of his intention to proceed with the appeal, on the ground that he had before been under a misapprehension as to a material matter of fact, which misapprehension had now been removed.

Held, that the withdrawal could not be rescinded, and that the appeal could not be heard.

[Ch. D., C. of A., Feb. 19, —.
50 L. J. R. 361; 19 W. R. 563.

The facts sufficiently appear from the above head-note.

On the opening of the appeal, on the preliminary objection being taken that the defendent, having withdrawn his appeal, could not proceed with it,—

Counsel for appellant contended that as the appeal had not been struck out they could proceed. When an order was made in Court in the presence of the parties by consent, it was open for either party to withdraw that consent at any time before the order was actually drawn up: *Rogers* v. *Horn*, 26 W. R. 432.

JAMES, L. J., was of opinion that it would be *pessimi exempti* if they were to allow such a withdrawal of the appeal as that which was contained in the letter of Jan. 26, 1881, to be rescinded. In this case it was true that within two days the appellant wrote, withdrawing his withdrawal. But it might have been after two years, and it was impossible to say what might not have been done by the respondents in the meantime on the faith of such withdrawal. The letter of the 26th of January could not be treated as a mere proposal to withdraw, but was a formal notice by the appellant of his intention to withdraw his appeal, and to avoid further costs he asked the respondents to consent to his withdrawal. The respondents gave their consent, and if the appellant wished afterwards to withdraw his withdrawal and return to his former position, his proper course would have been to have applied for leave to give fresh notice of appeal. If the notice of withdrawal had been given under any mistake of fact, the court might, upon a due consideration of all the facts, have acceded to such an application, but at present it knew nothing of the facts of the case.

LUSH, L. J., was of the same opinion. The proposal made on the one side, and accepted on the other constituted a contract which was binding on the parties, and did not require, in order that it should be perfected, that the appeal should be actually struck out of the list. If the case had come before the Court after what had taken place, their Lordships would themselves have ordered the appeal to be struck out. The proper course for the appellant would have been to have applied for leave to serve his notice of appeal, although such notice was out of time, and if he could have shown that there had been a mistake of a serious nature, in consequence of which he ought to be allowed to

withdraw his notice of withdrawal, the Court might have given leave. As it was, however, they knew nothing about the facts. He was of opinion that the proposal, when once accepted, became a contract by which the parties were bound.

The appeal was dismissed with costs, such costs not to include the respondents' costs of affidavits filed since the acceptance by him of the withdrawal.

Kay asked for leave to give notice of motion to enlarge the time for appealing.

The Court gave leave, but no motion was subsequently made.

LYON v. TWEDDELL.

Partnership—Action of dissolution on equitable grounds—Date from which it should commence.

Where the partnership articles contain no provision for the dissolution of the partnership, and the intervention of the Court is sought to put an end to the partnership on purely equitable grounds, such as incompatibility of temper, and a dissolution is decreed, the dissolution will date from the date of the judgment.

[Ch. D., C. of A., May 19.—50 L. J. R. 571; 44 L. T. 785.]

This was an appeal from a decision of BACON, V. C., who, when the action came on for trial, decreed a dissolution of the partnership, and held that the dissolution should date *from the date of the writ*, and directed that the partnership accounts should be taken in a particular manner.

The defendant appealed, and the only point calling for a report on the appeal was from what date the dissolution should date.

Counsel for the appellant declared the practice to be unsettled, and submitted that the dissolution should date from the judgment of the V. C. They cited *Besch* v. *Frolich*, 1 Ph. 172; 12 L. J. R., Ch. 118.

Counsel for respondent cited contra *Kirby* v. *Carr*, 3 Y. & C., Ex. 184; *Shepherd* v. *Allen*, 33 Beav., 577.

No reply was heard.

JESSEL, M. R.: I think on the whole the more convenient and better plan is to make the dissolution date from the date of the judgment. Consider the nature of the action. The action is instituted not to carry out or enforce any of the partnership articles, but asks the intervention of the Court on purely equitable grounds; that is to say, that under the circumstances the partnership is so detrimental to the parties that the Court is asked to intervene and to put an end to it. In such a case the dissolution should, in my opinion, as a matter of principle, date from the date of the judgment.

JAMES, L. J.: I am of the same opinion. I think that the date of the dissolution should be the date of the judgment, where the misconduct on which the dissolution is based is not in respect of any breach or misfeasance of the partnership articles or contract, but where it arises from incompatibility of temper or like matter. It appears to me that every word of Lord Cottenham's judgment in *Besch* v. *Frolich* applies to the present case, and that is really a matter of principle. But in holding this, I guard myself expressly, and say that it applies only where the dissolution is sought for misconduct not arising under the partnership articles.

LUSH, L. J.: The point is important, and one in which the practice should be settled. In the present case the partnership articles do not provide for a dissolution. In such a case, where both the partners are *sui juris*, and the court dissolves the partnership articles, it seems to me that the principle of the decision in *Besch* v. *Frolich* applies with even greater force than when one partner is a lunatic. I am also of opinion, therefore, that the dissolution should date from the date of the judgment.

IN RE SUTCLIFFE.—ALISON v. ALISON.

Discovery—Administration—Creditor.

A plaintiff in an administration action is entitled to discovery as to the property of the deceased debtor, at the earliest stage of the action.

[Ch. D., May 19.—50 L. J. R. 574; 19 W. R. 750.]

This was a motion by the plaintiff, a beneficiary in an administration action, to compel a further answer from the defendants, the representatives of the deceased debtor, to interrogatories, some of which they had objected to answer. One of the interrogatories was the old common interrogatory as to the details of the

deceased's personal estate. There was also an interrogatory as to the deceased's real estate.

The objection to answer these two interrogatories taken was, that they were not material at that stage of the action. The point was argued on the former interrogatory.

Counsel for the motion said that neither the reasons for giving the discovery, nor the practice in allowing it had been changed by the Judicature Act, (notwithstanding Imp. O. 31, r. 5, a rule not adopted in Ontario.) He cited *Saunders* v. *Jones*, 47 L. J. R., Ch. 440, L. R. 7 Ch. D. 435; and also *Thompson* v. *Dunn*, L. R. 5 Ch. 573; *Elmer* v. *Creasy*, 43 L. J. R. Ch. 166; L. R. 9 Ch. 69; *Sault* v. *Browne*, 43 L. J. R. Ch. 588; L. R. 9 Ch. 364.

FRY, J., after having determined that the interrogatory must be answered, said,—As this is an important point of practice, I will give my reasons. The interrogatory to which exception is taken, as being immaterial and not sufficiently relevant at this stage, is the old enquiry as to personal estate in administration suits. It is said that of late years, and I am glad to hear it, such interrogatories are not so frequent. The question is, whether the beneficiaries have lost the right of discovery which they had. In my opinion they have not. I will only refer to the case of *Thompson* v. *Dunn*, where Lord Hatherley expressed his opinion. * * * * * It appears to me that there is nothing whatever to which my attention has been called which deprives beneficiaries of that right against the executors. Furthermore it is important at this stage of the action to have the discovery for two purposes: in the first place the plaintiff may desire to move to have the funds paid into court; in the next place the account may satisfy him, and he may desire to discontinue the action. That interrogatory will therefore be allowed.

HASTINGS v. HURLEY.

Imp. O. 9, r. 13; O. 11, r. 1; O. 57, r. 6; Ont. O. 6, r. 12 (No. 44); O. 7. r. 1 (No. 45); O. 52, r. 9 (No. 462.)—Time—Extension—Service out of jurisdiction.

The time for endorsing the date of service on a writ served in the United States, was extended for a month from the application.

[Ch. D., March 8—50 L. J. R. 577.

This was a foreclosure action in which the writ had, under an order obtained for the purpose, been duly served on one of the defendants in the United States by the British Consul on Feb. 10th, who, however, had omitted to indorse the day of service on the writ.

Vernon Smith, for the plaintiff, applied by motion for an extension of the time limited to three days from service by Imp. O. 9. r. 13 for making the indorsement.

FRY, J., extended the time for a month from the present day, but required the consul to make a fresh affidavit of service.

[NOTE.—*Imp. O. 57, r. 6, and Ont. O. 52, r. 9, are identical. Imp. O. 11, r. 1, and Ont. O. 7, r. 1, are virtually identical. Imp. O. 9, r. 13, and Ont. O. 6, r. 12, are identical, excepting that the former declares absolutely that if the date of service is not endorsed on the writ within 3 days, the plaintiff shall not be at liberty, in case of non-appearance, to proceed by default, whereas the latter adds: "without the leave of a judge, such leave to be obtained at the cost of plaintiff, and such cost to be in no event charged against the defendant."*]

IN RE WADE AND THOMAS.

Taxation—Copies of documents—Mortgagee or transferee.

[Ch. D., April 28—50 L. J. R. 602.

A mortgagee or transferee of a mortgage who is being paid off, has a right, until the transaction is completed, to keep one fair copy only of the draft deed of reconveyance or transfer, and to charge the mortgagor for making it; but on payment off he is bound to hand over that and all other copies of documents relating to the property to the mortgagor.

[NOTE.—*There is, in this case, a somewhat long judgment of the M. R., but the above note of the result appears all that is needed in this place.*]

SCHNEIDER v. BATT and Co. PANWELS (third party.)

Imp. Jud. Act. 1873. *s.* 24. *sub.* 3; *O.* 16. *r.* 17, 18 —*Ont. Jud. Act. s.* 16. *subs.* 4; *O.* 12, *r.* 19, 20 *(Nos.* 107, 108.)—*Bringing in third party—Position of third party when the whole matter cannot be disposed of by one trial.*

In action against the defendants for breach of con-

tract they served P. as third party under Imp. O. 16. r. 18. The defendants then applied to the Court to give directions as to mode of trial; but the Court held that the matters could not all be decided at one trial, and declined to give any directions. Pleadings having been, by direction of the Q. B. Div., delivered between the defendants and the third party, the defendants then gave the third party notice of trial, the action between the plaintiff and the defendants having been already tried.

Held (affirming the judgment of the Q. B. D.) that as the Court had decided that all the questions could not be determined in one trial, the third party ought to be dismissed from the action, and that the notice of trial should therefore be set aside.

[Q. B. D., C. of A., May 19, 20.—50 L. J. R. 525.

The facts of this case sufficiently appear from the above head note.

BRAMWELL, L. J., who delivered the judgment of the Court, after observing, that speaking for himself, he thought that when a case is not within Imp. O. 16, r. 18, but is within rule 17 of the same order, the third party served with a notice which in terms brought the case within rule 18 (as was the case here) —should be dismissed, and not brought in on one ground and then retained and dealt with on another ground, continued :—

"However, assume that the case is properly brought under rule 17, then we think the object of the rule is that, where the same question may arise between two parties, where a plaintiff may say to a defendant, 'you complain that the goods sold to you are not according to contract,' and the defendant replies, 'If that is true, and if they are not, then then there is a third party who has broken a contract with me with respect to the same goods,' that same question should be tried once for all. But when, as in this case, a Court has decided that the same question shall not be tried once for all between all the parties, then the reason for retaining the third party is at an end. There is no reason why the provisions of rule 17 should be applied to the third party, and we think that the third party should be dismissed for the action. The Solicitor-General has said that the rules could not limit the operation of Jud. Act, 1873, sec. 24, subs. 3; but the rules have received a sanction which renders them equivalent to an Act of Parliament, and speaking for myself, I think that, although the rules ought to be interpreted according to the Act, still this view in effect does so. It may be observed that the section of the statute is permissive not obligatory or compulsory."

[NOTE: *Imp. J. Act 1873, s. 25, subs. 3. and Imp. O. 16, r. 17, are identical with Ont., J. Act, s. 16, subs. 4, and Ont. O. 12, r. 19 respectively. Imp. O. 16, r. 18 and Ont. O. 12, r. 20, are virtually identical, except that the former requires the leave of the court or judge before service of the notice n the third party, and also that the notice shall be stamped with same seal as writs of summons.*]

MUDGE V. ADAMS.

Imp. Jud. Act, 1873, s. 24, subs. 3.—Ont. Jud. Act, s. 16, subs. 4.—Protection order—Probate action—Statement of defence and counter claim praying for discharge of protection order.

[P. D. & A. D., Feb 1'—50 L. J. R. 49.

In this case the plaintiff as executor, propounded the will of defendant's wife. The statement of claim alleged that the deceased had duly executed the will while living apart from her husband after obtaining a protection order, and being possessed of separate estate. The statement of defence alleged that the protection order had been obtained fraudulently, and ought to be set aside. The defendant by his counter-claim, claimed (i.) that it might be declared that the protection order was fraudulent and void, and that the same be set aside and discharged; (ii.) that the Court should pronounce against the will propounded by the plaintiff; (iii.) that the Court should decree to the defendant a grant of letters of administration of the personal estate of the deceased as her lawful husband; (iv.) that in the alternative the Court should decree to the defendant a grant of letters of administration of so much of the personal estate and effects of the deceased as she had no power to dispose of by her will.

The plaintiff demurred on the ground that it was not alleged that the protection order had been revoked, and that it was not competent to the defendant in this proceeding to assail its validity.

The President (Sir James Hannen), held that the counter-claim was good, and that an ap-

plication to discharge the protection order could be entertained in a probate action. His judgment is chiefly concerned with other points which arose in the case, but as to the form of the pleadings, and the effect of the Judicature Act in this respect, he observes, after reading the above section :—

"The present case, in my opinion, comes exactly within those terms." (*i.e.*, of the said section). "If this defendant had instituted a suit or proceeding for the purpose of setting aside this protection order, the action would have been against this same plaintiff as claiming under the alleged will of the wife ; and this section says that what might have been asserted in that suit may be asserted by way of counter-claim in answer to the action of the plaintiff against the defendant.

"Now I should observe I am dealing with the pleadings as a whole. I think as a matter of refined argument it may be said that if the plea had stood by itself it would not be good, because I agree that while the protection order is subsisting it must be respected. But the counter-claim appears to me to be good, because by it the defendant asks specifically that the protection order be discharged, which is exactly the relief he would pray in the proceeding if they had been instituted in an independent suit."

[NOTE :—*Imp. J. Act*, 1873, *sec.* 24, *sub-s.* 3 *and Ont. J. Act. sec.* 16, *sub-s.* 4 *are identical.*]

LAW STUDENTS' DEPARTMENT.

EXAMINATION FOR CALL.

Dart's Vendors and Purchasers—Walkem on Wills—Statutes.

After a bid had been made at an auction and the property knocked down by the auctioneer, and before any contract had been signed, the bidder withdrew his bid and refused to complete the sale. Can he be compelled to complete ? Explain fully.

A. being desirous of purchasing certain property, and believing that the owner would more readily sell to C. than to himself, professes to act as the agent of C., but takes care that a formal contract is made out in his own name. Will specific performance be decreed as against the owner ? Give reasons for your answer.

What are the requisites of an agreement for the purchase of lands ? Can letters to third parties suffice to bind the writer ?

A. contracted to sell leaseholds to B., who paid part of the purchase money and then deposited with his bankers the contract, accompanied by a memorandum in which he agreed to assign to them the leasehold premises by way of mortgage. The bankers gave notice to A. of this agreement, who, notwithstanding, conveyed to B. Is A. liable for any loss sustained by the bankers ? Give reasons for your opinion.

In a lease from A. to B. the latter is given a right to purchase the premises at the end of a period which does not arrive until after the death of A. At the time named B. purchases the property. By his will, executed prior to the lease, A. had devised the property to X. Who is entitled to the purchase money paid by B., and to the rents which accrued prior to the purchase ? Is there any statutory enactment which may affect the question ?

What are the usual means of proving intestacy in showing title as between vendor and purchaser ? Have we any statute which renders such evidence less necessary than formerly in many cases ? Explain.

Is there any presumption in matters of title arising from age or sex that one of two persons who perished in the same catastrophe survived the other ? Explain how the law operates in such case.

A will is executed in the presence of three witnesses, one being the wife of a legatee, the second a creditor, and the third an executor. Is the will valid ? Explain fully.

A testator by his will devised, (1) to B. an estate tail in Blackacre ; (2) to C. (his son) $1,000 ; and (3) to D. (his nephew), $500. B., C., and D. died before the testator. Who are entitled to the benefits mentioned ? Explain fully.

What must be proved in order to establish the defence of purchaser for valuable consideration without notice ?

Blackstone, Vol. I.—Broom, B. III. & IV.—Harris' Criminal Law.

How many classes of abduction may be distinguished? Define the offence.

Define the crime of arson. In what cases is it necessary to prove an intent to injury or defraud.

Explain under what circumstances in criminal cases that exceptions are allowed to the rule that leading questions cannot be asked in examination in chief.

How far can general evidence of good character be disproved in criminal cases.

How many kinds of criminal information are there. Define them?

Define ignorance in a criminal sense. How far is it an excuse for crime?

Define municipal law.

How many ways can a corporation be dissolved.

Define an action of malicious prosecution. What must the plaintiff prove in order to succeed?

Write a short analysis of the extent of a master's responsibility for the torts of his servant.

Best on evidence—Byles on Bills—Smith on Contracts.

Write short comments on the rule, "The best evidence must be given."

Compare and contrast the effect of evidence, (*a*) in civil, (*b*) in criminal cases.

"Evidence to the character of parties is in general not admissible." State exceptions to this rule as fully as you can.

Give principal exceptions to the rule which requires primary evidence to be given.

Discuss the question whether or not the following words constitute a sufficient guaranty: "Mr. Wakefield will engage to pay the bill drawn on Pitman in favour of Stephen Saunders."

Where a party on whose account a policy of life assurance is made has no interest in the life insured, how will the policy be affected, and why? Answer fully.

Give the general powers which a commission merchant, entrusted with the possession of goods, has of disposing of the same. Answer fully, with reasons.

Pay C. or order $100 ten days after the death of X.; pay C. or order $100 in ten equal annual instalments on 1st September in each year, to be void on the death of X.; are these, or either of them, valid as Bills of Exchange, and why?

What is the legal effect of the payee of a bill not negotiable endorsing it? Would the effect be different in case of a note? Answer fully.

Under what circumstances will alteration of a note not vitiate it?

Equity Jurisprudence.

What is mutuality in the cases of (1) mortgages, and (2) specific performance of contracts.

What is the effect of a conveyance by which land is conveyed on trust in case a debt be not paid by a day named, to sell, and after payment of the debt and costs, to pay over the surplus to the grantor, and grantee covenants not to sell without giving six months' notice, and the grantor covenants to pay the debt and interest?

State who is entitled to the surplus money after a sale under a mortgage where the sale takes place, (1) during the lifetime, and (2) after the death of the mortgagor.

What is the effect of a conveyance of land or other property made without a consideration, and without a distinct use or trust?

Where money is directed to be converted into land, or land into money, and there remains over an unconverted residue, who is entitled to such unconverted residue?

State the classes of cases in which one person may sue on behalf of himself and of all other persons interested in the subject matter of the ligitation.

What rules does a court of equity follow in deciding on the validity and interpretation of (1) purely personal legacies, and (2) legacies charged on land.

Where a provision is made, by deed or will, for the payment of debts out of real estate, when will the Statute of Limitations cease to run?

Define a lien, and state how it may be enforced.

How far does the doctrine of election apply to creditors?

CORRESPONDENCE.

Cheap Law.

To the Editor of the CANADA LAW JOURNAL.

DEAR SIR,—There is another infringement on the rights of the legal practitioner to which I beg to call your attention. It may seem a small affair in the eyes of some, but the *smallness* consists in the parties who give rise to the nuisance. I refer to the columns of legal advice in some of our leading journals. One influential newspaper in a neighboring city publishes a regular list of "*queries*" from its numerous readers asking legal advice on the most abstruse matters, and some time ago it was announced in the paper, that this department, and the answers to be given to inquirers therein, would be presided over and attended to by a leading barrister of the city. The rage for cheap law has certainly of late been carried very far, but this last method is to my mind the most contemptible of its class yet known. It may be urged that the advice thus given will after all have to be revised by some legal gentleman after the full facts of the case are known. If this be so, then the newspaper advice is worthless, and on this ground alone should not be given. It is a sort of gentle fraud on its readers and a useless work of legal supererogation. I enclose you an extract from the above journal showing that the omniverous desire to give advice has broken out in a new spot.

Truly yours,

LEX.

St. Marys, Ont., Aug. 19, 1881.

[We cannot say we feel much exercised about this matter. Legal advice so given cannot be of any practical use, and we doubt whether it is ever acted on. If it is, probably so much the better for the lawyers.—EDS. L. J.]

FLOTSAM & JETSAM.

JUDGE ——— has long worn a black wig. Having lately donned a new one, which looks still darker, and meeting Senator Bayard, of Delaware, the latter accosted him with, "Why. Black, how young you look; you are not as gray as I am, and you must be twenty years older." "Humph," said the judge, "good reason; your hair comes by descent, and I got mine by purchase."

AN outspoken judge had to sentence a prisoner in Danville, Va., to prison for eighteen years, for murder, the jury making a "compromise verdict." The judge informed the defendant that the sentence was due to the "moral cowardice of twelve men." Telling him that he considered him guilty, the judge added, "You should rejoice and praise God that you fell into the hands of, and were tried by, a jury of your peers."

WE notice that Mr. Jonas ap Jones, for many years a solicitor in Toronto, has opened an office in London, for transaction of Canadian law business, particularly taking evidence under commission. The profession will no doubt find it to their advantage to have a careful and responsible solicitor in London, acquainted with the laws of Ontario, and the mode of charging customary here.

THE tone of the lay press in speaking of the law and the lawyers, is generally so recklessly and indiscriminately fault-finding, that the following views from our enterprising Kansas contemporary. *The Commonwealth, apropos* of the responsibility of lawyers in the General Assembly for improvident and illegal legislation, is really refreshing. "It is not the fault of the lawyers in the Legislature that so many unconstitutional laws are passed. Almost invariably such acts become laws in the face of protests from lawyers. . . . At every session there have been a lot of members who thought to make themselves popular by denouncing lawyers. Every measure proposed by a lawyer would be opposed by these wiseacres. They would try to make the people believe that lawyers were always trying to get some measure through to rob the people. The result has been, and always will be, that crude, unwise laws have been passed. We mean, always will be, till the people send men to the Legislature who either know something themselves, or know enough to know that they don't know anything, and will follow the advice of those who do know something."—*Central Law Journal.*

Law Society of Upper Canada.

OSGOODE HALL.

TRINITY TERM. 45TH VICT.

During this Term the following gentlemen were called to the degree of Barrister-at-Law. The names are placed in the order of merit:—

CALLED WITH HONOURS.

John Henry Mayne Campbell.

CALLED.

George Anthony Watson, John Sanders Macbeth, Horace Edgar Crawford, George Gordon Mills, Jeffrey Agar McCarthy, Charles Miller, Allan McNab, James Scott, Conrad Bitzer, William Elliott Macara, Samuel George McKay, James Brock O'Brian, Frederick Herbert Thompson, Frederick William Kittermaster, Alexander Ford, James Walter Curry, Edward Norman Lewis, Frederick Case, Abraham Nelles Duncombe, William Franklin Morphy.

The following gentlemen who passed their examination in Easter Term, 1881, were also called to the Bar this Term:—

Frederick Faber Harper, Solomon George McGill.

The following gentlemen were admitted into the Society as Students-at-Law, namely:—

GRADUATES.

Hugh St. Quentin Cayley, William Durie Gwynne, Thomas Chalmers Milligan, Alpin Morrison Walton, Douglas Armour, Thomas B. Bunting, Walter Laidlaw, Thomas Joseph Blain, George Washington Field, Samuel Clement Smoke, Henry Herbert Collier, Frederick W. Hill, Charles William Lasby, John Bell Jackson, James Metcalf McCallum, Thomas Edward Williams, George Morton, Frederick Ernest Nellis, Alexander Cameron Rutherford, Frank Henry Keefer, Lucius Quincy Coleman, Henry Thomas Thibley, Joseph Wesley St. John, John Douglas.

MATRICULANTS OF UNIVERSITIES.

Edward W. Hume Blake, Herbert Carlton Parks, Edward Charles Higgins, William H. Holmes, R. S. Smith, John Wesley White, John Paul Eastwood.

JUNIOR CLASS.

William Murray Douglas, George Marshall Bourinot, Thomas Urquhart, Alexander William Marquis, John Bell Dalzell, Osric L. Lewis, Frederick Stone, Alexander David Hardy, Donald James Thomson, Joseph Coulson Judd, Parker Ellis, John O'Hearn, Francis McPhillips, Henry Clay, Robert Casimir Dickson, Arthur Clement Camp, John Carson, Douglas Harington Cole, Thomas Steele, Andrew Charles Halter, Matthew Joseph McCarron, Robert G. Fisher, Charles Meek, W. H. F. Holmes, Paul Kingston, Harry George Tucker, Richard Vanstone.

And the Preliminary Examination for Articled Clerks was passed by William Mansfield Sinclair.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

Articled Clerks.

1881.
- Ovid, Fasti, B. I., vv. 1-300; or, Virgil, Æneid, B. II., vv. 1-317.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History—Queen Anne to George III.
- Modern Geography—N. America and Europe.
- Elements of Book-keeping.

In 1882, 1883, 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

Students-at-Law

CLASSICS.

1881.
- Xenophon, nabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero in Catilinam, II., III., IV.
- Ovid, Fasti, B. I., vv. 1-300.
- Virgil, Æneid, B. I., vv. 1-304.

1882.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum, (B. G. B. IV. c. 0- 36, B. V., c. 8-23.)
- Cicero, Pro Archia.
- Virgil, Æneid, B. II., vv. 1-317.
- Ovid, Heroides, Epistles V. XIII.

1883.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum.
- Cicero, Pro Archia.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Heroides, Epistles V. XIII.

1884.
- Cicero, Cato Major.
- Virgil, Æneid, B. V., vv. 1-361
- Ovid, Fasti, B. I., vv. 1-300.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.

1885.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid Bb. I., II., III.

ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a selected Poem:—

1881.—Lady of the Lake, with special reference to Cantos V. and VI.

1882.—The Deserted Village.
The Task, B. III.

1883.—Marmion, with special reference to Cantos V. and VI.

1884.—Elegy in a Country Churchyard.
The Traveller.

1885.—Lady of the Lake, with special reference to Canto V.
The Task, B. V.

HISTORY AND GEOGRAPHY.

English History from William III. to George III., inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek:—

FRENCH.

A paper on Grammar.

Translation from English into French Prose:—

1881.—Emile de Bonnechose, Lazare Hoche.

OR, NATURAL PHILOSOPHY.

Books.—Arnott's Elements of Physics, 7th edition, and Somerville's Physical Geography.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination, to be passed in the third year before the final Examination, shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery; O'Sullivan's Manual of Government in Canada; the Dominion and Ontario Statutes relating to Bills of Exchange and Promissory Notes, and Cap. 117, R. S. O., and amending Acts.

The Subjects and Books for the Second Intermediate Examination to be passed in the second year before the Final Examination, shall be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing, (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law; Underhill on Torts; Caps. 49, 95, 107, 108, and 136 of the R. S. O.

FINAL EXAMINATIONS.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Smith on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Harris's Principles of Criminal Law, and Books III. and IV. of Broom's Common Law, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Smith on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

The Primary Examinations for Students-at-Law and Articled Clerks will begin on the Second Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms

The Second Intermediate Examination, on the 3rd Tuesday, except in Trinity Term.

The First Intermediate, on the 3rd Thursday, except in Trinity Term.

The Attorneys' Examination, on the Wednesday, and the Barristers' Examinations, on the Thursday before each of the said Terms.

FEES.

Notice Fees	$1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Attorney's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fees each,	1 00
Fee in Special Cases additional to the above.	200 00

The following changes in the Curriculum will take effect at the examination before Hilary Term, 1882:—

FIRST INTERMEDIATE.

Williams on Real Property; Smith's Manual of Common Law; Smith's Manual of Equity; the Act respecting the Court of Chancery; Anson on Contracts; the Canadian Statutes relating to Bills of Exchange and Promissory Notes, and Cap. 117 R.S.O. and Amending Acts.

SECOND INTERMEDIATE.

Leith's Blackstone (2nd edition); Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages and Wills); Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act; Caps. 95, 107 and 130 of the Revised Statutes of Ontario.

FOR CERTIFICATE OF FITNESS.

Taylor on Titles; Hawkins on Wills; Taylor's Equity Jurisprudence; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and the Pleadings and Practice of the Courts.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's Principles of Criminal Law, and Books III. and IV. of Broom's Common Law; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills; the Statute Law and the Pleadings and Practice of the Courts.

Canada Law Journal.

VOL. XVII. OCTOBER 15, 1881. NO. 19.

DIARY FOR OCTOBER.

15. Sat...County Court Term for York ends.
16. Sun..*18th Sunday after Trinity.*
21. Battle of Trafalgar, 1805.
23. Sun..*19th Sunday after Trinity.* Lord Monck, Gov.-Gen., 1861.
24. Mon...Sir J. H. Craig, Gov.-Gen., 1807.
25. Tu...Supreme Court sittings. Battle of Balaclava, 1854.

TORONTO, OCT. 15, 1881.

As we go to press we receive A Manual of Practice of the High Court of Justice for Ontario, by Mr. G. O. Holmested, Registrar of the Chancery Division. A glance at it is sufficient to show that it is a work of a different character, and on a different plan to any as yet published, and from our recollection of the able manner in which the author a short time ago edited the more recent Chancery Orders, we have little doubt that the manual will be found of much value. We hope to give a more detailed notice of it in a future number.

So far as we are able to judge even Winnipeg appears to possess at the present moment as many lawyers as she requires. Many of them, however, have, as we are informed, been enticed away from the worship of their stern Mistress Themis, by the allurements of the god Plutus, and have found thereby a short road to wealth. But there can be little doubt that for many a year to come, those who are willing to scorn delights and live laborious days, and who will keep clear of speculation, will find it far easier to build up a practice there than in Ontario. Moreover, the fact that Manitoba retains the old practice under the Common Law Proceedure Act may perhaps be an inducement to emigrate thither to some of those who think that they have had enough variety in the way of practice during the past few years.

IT is our intention to notice any points of interest that may present themselves in current English enactments. The last batch of statutes, however, contained in the September number of the Law Reports, being the 44-45 Vict. c. 1-22, contains nothing that seems to demand attention. The acts are chiefly of an administrative character, and amongst them are "The protection of person and property (Ireland) Act, 1881," and "The peace and preservation (Ireland) Act, 1881," of unhallowed memory. But as might be expected there is nothing in the nature of law reform, nor are there any acts of special interest to Canadians.

WE also introduce into this number, what we hope to make a permanent and useful feature of the CANADA LAW JOURNAL, viz.: an article on recent decisions, Canadian and English. Our purpose is to present to the profession regularly, in a consecutive and readable form, such a running review of the latest reported cases in our own and in the English courts as will enable our readers to keep track of contemporary decisions, even though they may not indulge in the expense of subscribing to the Law Reports. We have good hope, however, that even those who do take in the Law Reports will find our articles a considerable convenience and saving of labour. As we understand the matter, one of the most important functions

of a Law Journal is to supply the profession with such information as cannot be found in existing text-books, but which is needed in practice: and it is by prompt notices of current decisions, statutes and topics of interest that we hope to effect this object. No American decisions are noted in our present number. We shall, however, make use of the wealth of cases and comments contained in our most able contemporaries across the border, when we notice any current American decisions which appear of special interest.

THERE are two subjects which it is to be hoped will not be overlooked in deciding the courses of lectures to be delivered in the Law School, the revival of which, we trust, may now be considered merely a question of time. Of these one is the subject of General Jurisprudence, and the other that of Constitutional Law with special reference to the Dominion of Canada. There is the more need that the former of these two subjects should be embraced in the course in that no law school exists in the Universities in Toronto, similar to the law schools of Oxford, Cambridge or London Universities. The present activity of these latter Universities in this department is shown by the frequent admirable works published by their professors and lecturers, as for example Digby's History of the Law of Real property, Markby's Elements of Law, Anson on the principles of the Law of Contracts, and Prof. Erskine Holland's Elements of Jurisprudence. The method and clearness and consequent facility which such works as these, and as Austin's lectures, contribute to the study of the law is beyond question; while the intrinsic interest of the works of Sir Henry Maine and other writers on historical comparative jurisprudence is equally indisputable. On the other hand, the claims of constitutional law with special reference to our own constitution and that of the empire are obvious, while the now standard work of Mr. Alpheus Todd will immensely facilitate the treatment of this subject. It needs no argument to enforce the importance of Canadians possessing clear ideas of the constitutional lines on which is being built up, as we all trust, a great and prosperous commonwealth.

RIGHTS AND WRONGS OF THE PROFESSION.

We lately criticised the advertisement of the solicitor whose letter appears in another place in explanation of its publication. Mr. Rogers puts his *απολογια* in a manly, straightforward way, and we gladly insert his communication. By accepting our criticism as deserved and withdrawing the objectionable advertisement he disarms further comment thereon, and at the same time makes out a strong case for himself, and shows forcibly the position in which he and other country practitioners are placed in regard to the "impudent invaders" he speaks of. The outrageous injustice of the present state of things must strike any one. There is practically no protection afforded by the Law Society. There is, for a country practitioner, scarcely any reason why he should waste his time as an articled clerk or pay the entrance fees to the Society. Litigation *is not*, and the business of conveyancing, Surrogate Courts and Division Courts *is* what gives a living to our brethren in the country. As to the Benchers, they are, we believe, anxious, and honestly intend to do something, but it is really a very difficult thing to say what is best to be done. As to the point made against County judges in reference to Division Court and Surrogate business there is no excuse for them. Many of these have deliberately and without necessity (we are not now alluding to sec. 84 of the D. C. Act) opened the door to a swarm of wasps that are sting-

ing to death the rightful occupants (by right of purchase) of the professional nest. We would commend this subject to the Board of County Judges—let them see what they can do in the premises. We have arraigned the Benchers at the bar of the profession with good effect. We now call upon the County judges to do their part; let the local Bar also keep them in mind of what they owe to the public and the profession. We should be glad to hear further as to this part of the question. In the meantime we might recommend a perusal of the remarks in O'Brien's D. C. Manual, 1880, at pp. 28, 38, etc., in reference to Division Court "agents." We are glad to know that the practice there suggested is followed by some of the best of the local judges. The position of agents as to Surrogate business is also worthy of discussion.

A REVOLUTIONARY PROPOSAL.

One example of the energy with which the constructive power of man is working in the North-West is afforded by the rapidity with which the profession in Manitoba have erected barricades between themselves and the outer world. An Ontario lawyer who desires to seek fresh fields and pastures new in the Virgin Province finds that he has several formidable obstacles to pass before he is admitted to practice. First, in order to be eligible for call to the bar, he has to give six weeks' notice of his intention to present himself for examination in no trifling array of text-books, to wit, Leake on Contracts; Byles on Bills; Addison on Torts; Snell's Equity; Taylor on Evidence; and Williams on Real Property; to say nothing of the statute law applicable to Manitoba, and the practice and pleadings of the courts. Then, having survived this ordeal, he is required, should he desire admittance as an Attorney, to article himself for a year, and then apparently again to pass an examination in the same books with the exception of Taylor on Evidence, though whether he may present himself for the two examinations at one time, or whether he cannot present himself for the examination for certificate of Fitness until he has completed his year under articles, we are not advised. But in addition to this somewhat rough handling, he has to pay about two hundred and seventy dollars in fees.

Now no doubt the majority of the Benchers of the Manitoba Law Society, argue that if their barristers and attorneys desire to practice their profession in the older provinces they have to go through a similar process of initiation, and that one good turn deserves another. But, after all, is not this kind of thing a *reductio ad absurdum* of provincial rights. The whole object and justification of requiring the service for a certain period as articled clerks and the passing of certain examinations before admitting men to practice as lawyers is to protect the community from unauthorized and incompetent practitioners.

The interest of the community is to have as large a number of competent lawyers to pick from as possible. No doubt in the case of the Province of Quebec, where the civil law prevails and where the procedure follows a different model, it is but right in the interest of the public that any lawyer from the other provinces desiring to go and practice there should serve an initiatory term and pass preliminary examinations, and *vice versa*. But in the case of the other provinces, where the law and practice are similar, we would ask whether the diplomas and certificates granted in one province by the proper authorities, should not,—on a principle of inter-provincial comity,—be accepted as sufficient to qualify for practice in the Courts of the sister provinces; or at all events, should not solicitors and barristers of a certain number of years standing, be free to practise their profession in any province in the Dominion, excepting, for special reasons, the Province of Quebec?

We might have ventured to hope that Manitoba, in the generosity of youth, would have set the example in this respect, and that as she is the child of the confederated Dominion, so she would have led the way in the adoption of this truly "National Policy." At the same time it must be admitted that the adoption of the new practice modelled on the rules and orders framed in England under the Judicature Acts in some of the provinces and not in others will create fresh difficulty in the realization of this idea, and it is of course vain to hope that anything like a simultaneous adoption of the new practice in all the provinces can be looked for.

THE ACTS OF LAST SESSION.

DOMINION : 44 VICT.

Pursuant to the intention expressed in our number for September 1st, we purpose to give now a concise summary of such of the Treaties, Orders in Council, and Dominion enactments of last session contained in the volume of the Statutes of Canada for 1880–1881, as are of special importance to the practical lawyer. This we may add is a far less onerous undertaking than was the similar one with regard to the Provincial enactments.

The only document contained under the head of Treaties is a declaration between Great Britain and Russia, relative to the disposal of the estates of deceased seamen of the two nations. We need merely mention that under it the estate of any British seaman who shall die, either on board a Russian or Finnish ship, or within Russian territory, if not exceeding 350 silver roubles, shall be delivered to the nearest British Consul without undergoing any of the forms usually required by Russian or Finnish law on succession to property, and so, *mutatis mutandis*, with regard to the estate of any Russian or Finnish seaman dying on board a British ship or within British territory.

Of the orders in Council the first to be noticed is that dated July 31st, 1880, under which from and after September 1st, 1880, all British possessions in North America, not already included within the Dominion of Canada, and all Islands adjacent to any such possessions, shall (with the exception of Newfoundland and its dependencies) become and be annexed to and form part of the Dominion of Canada; and become and be subject to the laws for the time being a force in the said Dominion, in so far as such laws may be applicable thereto. Next we may notice a Proclamation (p. xviii.) dated Nov. 13, 1880, whereby the 43 Vict. c. 7 (C), intituled "An Act for the final settlement of claims to Lands in Manitoba by occupancy under 33 Vict. c. 3," is made public and put in force, which Proclamation is contained in Vol. xiv. p. 713 of the Canada Gazette. Following this is a Proclamation setting off and forming four additional Registration Districts in the North West territories, to wit, the Turtle Mountain District, the Little Saskatchewan District, the Touchwood Hills District, and the Prince Albert District, (see Can. Gaz. Vol. xiv. p. 869). The only other document published under the heading of "Orders in Council, etc.", which need be noticed here is the General Rule made by the Judges of the Supreme Court in amendment of the existing rules, and dated March 16, 1881. The first alteration made (p. xx.) appears to be merely of a clerical nature, and strikes out the word "immediately" from rule 11, not seemingly changing the effect of the rule in any way. The next change made is in rule 14, and pursuant to it it is sufficient if notice of hearing be served fifteen days before the first day of the session at which the appeal is to be heard. Then rule 15 is altered so far as concerns the mailing of a copy of the notice of hearing to the attorney or solicitor who represented the respondent in the Court be-

low, in those cases where such attorney or solicitor has no booked agent or elected domicile at Ottawa. It is now made requisite that such copy should be mailed on the same day on which the notice is affixed in the office of the Registrar as provided in that rule, but the proviso that each copy must be mailed "in sufficient time to reach him in due course of mail before the time required for service" is done away with. Next, rule 23 is amended on the same principle as the amendment of rule 14 just noticed, and it is sufficient if factums are henceforth deposited with the Registrar fifteen days before the session at which the appeal is to be heard, instead of one month as required heretofore. Similarly rule 31 is altered, and it is now sufficient if the Registrar set down and inscribe appeals *fourteen* days before the session fixed for the hearing, instead of one month as heretofore, but the following provision is now added to the rule, viz: "but no appeal shall be so inscribed which shall not have been filed twenty clear days before said first day of said session without the leave of the Court or a judge." So again in rule 62 the period of one month is changed to fifteen days, and so a respondent, desiring to serve a notice of cross appeal under rule 61, is now only required to make it a fifteen days notice. And lastly, the period of two weeks in rule 63 is shortened to one week, and so an appellant, in case of a cross appeal by a respondent, is now only allowed one week after service of the notice of cross appeal required by rules 61, and 62, in which to deposit his printed Factum with the Registrar. So that in all these cases the periods in which acts are to be done under the rules of the Supreme court are shortened by one half.

Proceeding now to the Acts of Parliament the first which seems to require notice is entitled an Act respecting Naturalization and Aliens (Chap. 13). The final clause of this Act provides that after it comes into force no alien shall be naturalized within Canada, except under its provisions, and sec. 2 provides that the date of its coming into force shall be fixed by proclamation of the Governor. In his Parliamentary Government in the British Colonies, Mr. Todd, after a sketch, in his usual lucid manner, of the present state of the naturalization question in Canada, observes that—"while by sec. 91 of the B. N. A. Act, 1867, the Dominion Parliament is exclusively empowered to legislate upon "naturalization and aliens," it has been assumed that, by sec. 92 of this act—which empowers provincial legislatures to exclusively make laws concerning 'property and civil rights in the province'—these legislatures are competent to authorize aliens to hold and transmit real estate:" and in a foot-note he says that the Dominion Naturalization Acts, which apply to all the provinces, contain no provisions of this nature. The recent Act, now under consideration, appears the first exception to this rule, for under the heading "Status of Aliens in Canada," sec. 4 provides that aliens may hold and transmit property of any kind in the same manner as British subjects, but that this section is not to qualify for any office or any franchise, nor shall it affect dispositions made before its passing. The remainder of the Act concerns the subjects of declarations of alienage, expatriation, naturalization and resumption of British nationality, national status of married women and infant children, and contains also some sections on miscellaneous points. It does not, however, come within our scope to discuss it any further here, but it may be added that by sec. 38 aliens naturalized in any part of Canada before this act, are to be hereafter entitled to all the privileges by this act conferred on persons naturalized under this Act.

The next Act to notice is chap. 15, which enacts that the 43 Vict. c. 36 (C), being "An Act respecting the Administration of criminal Justice in the Territory in dispute between the governments of the Province of Ontario and of the Dominion of Canada,' shall continue in force "until the end of the

now next ensuing session of Parliament." Then follows an Act in amendment of the Dominion Lands Acts of 1879 and 1880 (42 Vict. chap. 31, and 43 Vict. c. 26), the provisions of which are of a purely administrative nature and require no further notice here; nor does there appear to be any Act to which we need call special attention until chap. 27 is reached. We may, however, mention that by chap. 25 the Laws relating to Government railways are amended and consolidated.

By chap. 27, sec. 14 of 40 Vict. c. 41, which repealed sec. 58 of the Insolvent Act of 1875, (38 Vict. c. 16), is itself repealed, and the said sec. 58 is revived: which section provided that if the dividend paid to the creditors by the estate of the insolvent is less than 33 per cent, the discharge of the insolvent may be suspended or refused altogether. But of course this Act only applies, as declared sec. 2, to proceedings under the insolvent acts where the estate of the insolvent has been vested in official assignees before the passing of the Act of last session, repealing the Acts respecting insolvency now in force in Canada, (43 Vict. c. 1). By this Act (chap. 27) also, sec. 15 of 40 Vict. c. 41 is repealed, so that a Judge is no longer required, before granting a discharge, to exact proof of the fulfilment of the condition in that section mentioned.

The next Act, chap. 28, is entitled an Act to amend the Law respecting Documentary Evidence in certain cases, and provides that "in addition to and not in derogation of any powers of proving documents given by any existing statute or existing at common law," *prima facie* evidence of proclamations, orders, regulations or appointments made by the Govenor-General may, in all legal proceedings over which the Parliament of Canada has control, be proved either (i) by a copy of the *Canada Gazette* containing a notice thereof, or (ii) but producing a copy thereof purporting to be printed by the Queen's Printer for Canada, or (iii) by producing a copy duly certified: and so, *mutatis mutandis*, with proclamations, etc., by the Lieutenant-Governers of Provinces. And wilful imposture in respect to these matters is made a felony, and punishable by imprisonment.

Lastly, chap. 29 provides for the continuance in force of "The better Prevention of Crime Act, 1878," (41 Vict. c. 17) until the end of the "now next ensuing session of Parliament:" while the remaining acts, public and private, it does not fall within the scheme of this review to notice.

RECENT DECISIONS.

The first case which it occurs to us to notice in no. 1 of vol. 29 of Grant's Reports, now before us, is a decision of Boyd, C. on a point of practice in connection with receivers, which, stated in a general way, appears to be as follows: Where, after a decree directing the appointment of a receiver, but before the actual appointment, any act is done which is complained of as improper, and an interference with the office of the receiver, the proper course is for the interested parties to the suit, who object, to apply in person for the appropriate relief, and not to move for an order that the receiver shall take proceedings to rectify what is done (*Fox* v. *Nipissing Ry. Co.*, p. 11). Closely following on this is the case of *Court* v. *Holland*, in which the learned Chancellor observes, citing *Murray* v. *O'Dea*, 1 B. & B. 117, that as between mortgagor and mortgagee, there is nothing to prevent the mortgagee taking possession at a fair and reasonable rent agreed upon between them; and in such a case this will ordinarily be the measure of liability, because the mortgagee is not in, technically, as mortgagee in possession, but as under the special agreement. A subsequent incumbrancer however is not bound by the transaction, but can insis upon such a rent as would be a proper occupa-

tion rent chargeable against a mortgagee in possession, for he has a perfect right to reduce the prior security by the amount of a fair occupation rent. The case of *Platt* v. *Blizzard*, at p. 46, was a suit for specific performance, and the Master reported that a good title to the lands was *first* shown in his office. Nevertheless, on further directions, Ferguson, V. C., ordered the costs to be paid by the defendant, because the facts showed that the litigation was really about a matter other than the question of title, as to which the plaintiff had succeeded and the defendant entirely failed : in this following the rule laid down in *Monro* v. *Taylor*, 8 Ha. 70, S. C., in app. 3 McN. & G. 725, that, in such cases, "in deciding who shall pay the costs of the suit, the court must inquire by whom and by what the litigation was occasioned." In *Young* v. *Huber* (p. 49) the V. C. followed *Peterkin* v. *Macfarlane*, 4 App. 25 (in which report, however, this point is not referred to), as a precedent for adding, on motion after decree, certain parties as defendants, for the purposes of an injunction. The last case we shall no tice is *Lancey* v. *Johnston* (p. 67), which, as the learned V. C. observes in his judgment, is in many respects very peculiar. It was a motion for an injunction to restrain a lessee from pumping oil from an oil well on the lands leased. The only covenants contained in the lease on the part of the lessee, were to pay rent and pay taxes, and it was silent as to any right on his part to bore for oil. The lessee contended that his real contract was for a purchase in fee, and that he could prove a right, if necessary, to have the document reformed. The V. C., however, held that *prima facie* the lessee had not the right to bore for oil, and granted an injunction until the hearing of the cause.

Passing now to the English Law Reports we have before us the September numbers of the Chancery Division (17 Ch. D. 615-720), and of the Queen's Bench Division (7 Q. B. D. 273-399). The first case in the former, *Dawkins* v. *Antrobus*, is interesting, as club-cases generally are. The report comprises both the case in the court below, and in the Court of Appeal. The case of *Labouchere* v. *Wharncliffe*, M. R. Nov. 28, 1879, came before the M. R., in the interim between the two hearings of *Dawkins* v. *Antrobus:* in which period also was published an able pamphlet on Club Cases, by a Mr. A. F. Leach (London, Harrison, 1879), which we have before us. At p. 45 this writer says that, the principles that may be deduced by all the cases then decided are as follows :— "A man who becomes a member of a club, binds himself by a written contract, which is to be found in the rules of the club. Those rules are the laws from and by which his rights and duties as a member are to be ascertained and governed. If these rules give (as all club rules do give) an unlimited power of expulsion to the committee or to the general body of the club, the exercise of that power is not a matter for the interference of the law courts; provided that the power be exercised (1) in accordance with the letter and spirit of the rules; (2) in a *bona fide* manner and not capriciously or oppressively; and (3) in a fair and impartial manner in accordance with the ordinary principles of justice." There is nothing in the judgments of the Court of Appeal in *Dawkins* v. *Antrobus*, which seems to militate against Mr. Leach's deductions. All three Judges protest against the propriety of the courts undertaking to act as Courts of Appeal against the decisions of members of clubs. Some remarks of Brett, L. J., however, in support of his proposition that the courts can properly entertain the question whether anything has been done which is contrary to *natural justice*, although it is within the rules of the club, appear noteworthy. It may also be observed that in his judgment, James, L. J. expresses an opinion that, reading "club" for "trading partnership," every word of the judgment in *Inderwick* v. *Snell*, 2 Mac. & G, 216, is applicable to the case before him. As a recent Canadian case on a somewhat similar

subject, we may refer to *Marsh* v. *Huron College*, 27 Gr. 605.

In the next case, *Hendricks* v. *Montagu* (p. 638) it was held, on appeal, that a company not registered under the Imp. Companies Act 1862, can restrain the registration under that Act of a projected new company, which is intended to carry on the same business as the unregistered company and to bear a name so similar to that of the unregistered company as to be calculated to deceive the public. The case *of ex-parte Young, In re Kitchin*, p. 668, appears to be one of first impression so far as the English courts are concerned. The question was, whether in the absence of special agreement a judgment or an award against a principal debtor is binding on the surety, and is evidence against him in an action against him by the creditor? All three judges decided it was not; but that the surety is entitled to have the liability proved as against him in the same way as against the principal debtor. This is in accordance with the holding in the Courts of the United States on this very point, in *Douglass* v. *Howland*, 24 Wend. 35. It may be added that it is observed by counsel, arguendo, that the surety cannot be brought in by a third party notice under the Judicature Act, for the principal has no right of indemnity against him.

The next case, *Wheeler* v. *Le Marchant*, p. 675, is a decision on a point of practice and will be found among our Recent English Practice cases in this number. In *Evans* v. *Williamson*, p. 696, a testatrix, after devising all her real estate to A., gave all the "farming stock, goods, chattels and effects in and about" one of her farms forming part of her real estate, to B: and she gave the residue of her personal estate to other persons. The M. R. held that all crops growing on the farm at the testratrix's death passed to B., and expressed disproval of *Vaisey* v. *Reynolds*, 5 Russ. 16, where Sir John Leach held that the growing crops did not pass under the gift of the farming stock, as against the devisee of the land, because there was no gift of the residuary personal estate to the legatee of the farming stock.

Rees v. *George*, p. 701, was a decision on the subject of interest to be charged on sums advanced brought into hotchpot. Under the will of their father, children were to divide the residuary estate after the death of their mother, but to bring into hotchpot sums advanced in their lifetime by the testator. In distributing the residuary estate among the children after the death of the widow, the M. R. held the advanced children must bring their advances into hotchpot, with interest at 4 per cent. per annum up to the distribution of the estate; such interest to be computed from the death of the widow, and not from the dates of the respective advances or from the death of the testator.

Walter v. *Howe*, p. 708 is of special interest to the literary world, being as it is an authority for the proposition that to enable the proprietor of a newspaper to sue in respect of a piracy of any article therein, he must show not merely that the author of the article has been paid for his service, but that it has been composed on the terms that the copyright therein shall belong to such proprietor.

In *English Channel S. S. Co.* v. *Rolt*, p. 715, it was held by V. C. Malins that the term "capital not called up" in the articles of association of a company included shares which had not been issued.

Passing now to the September number of the Queen's Bench Division, the first case requiring notice appears to be *Saxby* v. *Gloucester Waggon Co.*, p. 305, which was a patent case of an interesting nature. It was admitted by the plaintiff's witnesses that every element of the patent was to be found in one or the other of two previous inventions, and that no new result was obtained by their combination now in question different from that obtained by the previous inventions, but it was contended that the combination of the two previous inventions affected by the plain-

tiff required such an exercise of skill and ingenuity as to constitute the subject of a valid patent. The Court, however, was satisfied, on the evidence, that any person of ordinary skill and knowledge of the subject, placing the two previous inventions side by side, could effect the combination of the two in a manner similar to the plaintiff's invention without making any further experiments or obtaining any further information. The Court, therefore, held that the plaintiff's invention was not of sufficient novelty to constitute the subject of a valid patent. The case of *Poyser* v. *Minors*, p. 329, contains some interesting law as to non-suits, and it was held that the rule committee of County Court Judges had power to make the rule that a non-suit shall be equivalent to a judgment for the defendant, as "regulating the practice of the Courts and forms of proceedings therein," such being the terms of their statutory power. Bramwell, L. J., however, dissented from Baggallay and Lush, L. J. J Some notice of this case will be found among our recent English practice cases.

The case of the *New Zealand and Australian Land Co.* v. *Watson*, p. 374, is on the subject of principal and agent, and concerning as it does, the business of exporting wheat for sale in England, appears worthy of special notice. The plaintiffs, who were landowners in New Zealand, used to consign their wheat to M. & T., merchants, amongst other places, at Glasgow, with instructions to sell the wheat in London. M. & T., as plaintiffs were aware, used to employ the defendants, who were corn-factors and brokers in London, for the purpose of selling there the wheat, but the plaintiffs were in no way parties to the particular contracts of sale, nor were their names disclosed upon them. M. & T. failed, and when they stopped payment were indebted to the defendants on other accounts, but not on the Glasgow account. The plaintiffs brought an action for the net balance of the proceeds of the cargoes of wheat in the hands of the defendants, after deducting the remittances made to M. & T. in respect thereof. The jury found at the trial that the plaintiffs did not, through their agents, employ the defendants to sell and account for the proceeds of the wheat; secondly, that the defendants knew, or had reason to believe, that M. & T. were acting in the sales as agents for a third person. The Court of Appeal, however, held (reversing the judgment of Field, J.) that the plaintiffs were not entitled to recover, as there was no privity of contract between them and the defendants, and the defendants did not stand in any fiduciary character towards the plaintiffs so as to entitle the latter to follow the proceeds of their property in the defendants' hands, and as whatever right the plaintiffs might have had as owners to claim the wheat before it had been sold, they had no right, after such sale, to the proceeds, without giving credit for the sum due to the defendants from M. & T. on their *general* account.

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

SEPTEMBER 17.

IN RE RYER AND PLOWS.

Memorandum of conviction—Appeal to Sessions—Return of conviction after verdict—Mandamus.

A conviction must be under seal. A conviction may be returned and proved at any time during the hearing of an appeal therefrom to the General Sessions, or, in the discretion of the Chairman, even during an adjournment for judgment. A minute of conviction signed by the Justice, but not sealed, was returned to the Sessions upon the entering of an appeal therefrom by the defendants. The jury found the defendant guilty of the offence of which he had been convicted, but on motion for judgment he objected that the conviction was not sealed. The Chairman reserved judgment until a day named, and during the adjournment the Justices returned and filed a conviction under seal. The Chairman then declined to receive it, or to give judgment, holding that there was no conviction upon which to found the appeal, which had been heard.

Held, that the prosecutor was not entitled to a mandamus to compel him to deliver judgment; for the reception of the conviction in evidence at that period was for the Chairman's discretion, which could not be reviewed.

George Bell, for the prosecutor.

W. H. P. Clement, contra.

REGINA v. GREAVES.

Road company—Tolls—Repairs—R. S. O. ch. 152.

Under "The General Road Companies Act," R. S. O. ch. 152, secs. 102, 104, 109, the first engineer appointed to examine a road, alleged to be out of repair, must act throughout the proceeding, unless another is appointed under sec 109; but under that section the Judge is the person to be satisfied that the first engineer is unable to make or complete the examination and his decision on that point cannot be reviewed.

The engineer appointed under the Act need possess no official certificate or degree.

The second engineer having been appointed in January to examine and report "as to the present condition of the road" made an examination and so certified, but was unable to report whether the repairs directed by the previous engineer had been performed, as it was covered with snow. In May following, without any further authority, he again examined and certified that it was in good repair, and the company began again to take tolls.

Held, that he was *functus officio* after the first examination, and that the tolls, therefore, were illegally imposed.

Ewart, for the prosecutor.

Pegley, contra.

SEPTEMBER 23.

IN RE PECK AND THE CORPORATION OF THE TOWN OF GALT.

Dedication of public square—Powers of municipality to close—By-law not in public interest—Municipal Act, ss. 467 and 509—Costs.

A municipal corporation laying out a square or park, on lands acquired by them untrammelled by any trust as to its disposal, may deal with it in any manner authorized by session 509 of the Municipal Act, R. S. O., ch. 174, at least where no private rights have been acquired in consequence of their action, but they cannot so deal with lands dedicated by the owner for a special purpose, which case is provided for by section 467. Whether the dedication arises only from the act of the owner, or by express grant, the municipality must accept it, if at all, for the purpose indicated.

The owner of land dedicated to the public a square by filing a plan upon which were the words, "Square to remain always free from erection or obstruction."

Held, that the municipality had no power to

close up part thereof, and dispose of it to trustees of a church.

The by-law for this purpose contained a provision that the trustees of the church should pay all expenses in connection with the by-law, and that it should not take effect till the municipality had been indemnified against loss by reason of passing it and of any proceedings to quash it.

Held, bad on its face, for it was plainly not passed in the public interest, but for the benefit of a particular class.

Held, also, that the applicant was not precluded from moving against the by-law by reason of his having expressed an opinion in its favour before its passage.

Costs were not asked for in the rule, though they were at the bar: *Held*, that as costs are in the discretion of the Court under the Judicature Act, this was no objection.

C. A. Durand, for the applicant.

J. K. Kerr, Q. C., contra.

CHANCERY DIVISION.

Ferguson, J.] [September 12.

KEEFER v. MACKAY.

Will, construction of—Vested estate—Trustee for sale—Partition.

A will contained a devise, in trust for the support and maintenance of the testator's widow, during her life or widowhood, with a direction that she should have the full right to possess, occupy, and direct the management of the property; and at her death or second marriage, "my son Thomas, if he be then living, shall have and take Lot one, which I hereby devise to him." Thomas died before his mother.

Held, that he took a vested remainder in Lot one. The will further contained a devise of lots two, etc., to the testator's sons, Alexander, John, Charles and Thomas, their heirs and assigns, as tenants in common, and a direction that the same should take effect from and after the death or second marriage of the testator's widow. There was a proviso that if any child died without issue before coming into possession of his share the same should go to the survivors. An indenture was executed between the parties, conveying all the estate, etc., of those interested to Alexander, John, Charles and Thomas, after the execution of which Alexander and Charles died. An Act of Parliament was subsequently passed confirming this indenture and declaring that it should take effect from its date and not to be affected by subsequent deaths of the testator's children, and it confirmed the estate in John and Thomas as tenants in common subject to the life estate of their mother, and with the right of survivorship between them in case of one dying before the other, before the death or marriage of their mother. After this and in his mother's lifetime John died.

Held, that Thomas took a vested remainder in fee expectant upon the determination of his mother's life estate.

The residue of the estate was directed to be converted, and to be at the disposal of the widow for her life, while she remained unmarried, and thereafter to the children. This was subject to the above proviso as to coming into possession.

Held, that the children took vested interests in the fund, subject to be directed on the contingency mentioned.

The plaintiff being a trustee for sale was held not to be in a position to ask for partition.

S. H. Blake, Q. C., for plaintiff.

John Hoskin, Q. C., for infant defendants.

Maclennan, Q. C., *Rae* and *Black*, for other defendants.

Boyd, C.] [Sept. 29.

CAMPBELL v. CAMPBELL.

Pleading—Demurrer—Alimony—Fraudulent conveyance.

The plaintiff filed her bill for alimony, alleging that a conspiracy had been entered into between her husband and the other defendant to prevent her realizing any alimony that might be awarded her, and for that purpose the husband had fraudulently conveyed all his lands to his brother—the co-defendant, and praying to have the same declared fraudulent. The brother demurred for multifariousness, want of equity, and want of parties.

The Court [BOYD, C.,] over-ruled the demurrer on the first two grounds, but allowed that for want of parties; the plaintiff not having re-

covered judgment and execution could only sue in a representative capacity—that is, on behalf of herself and all other creditors. *Longeway* v. *Mitchell*, 17 Gr. 190; *Turner* v. *Smith*, 26 Gr. 198; *Colver* v. *Swagge*, *ib.* 395 and *Morphy* v. *Wilson*, 27 Gr. 1, considered and followed.

Meredith, for demurrer.

I. Campbell, contra.

Boyd, C.] [Sept. 29.

NEEDHAM v. NEEDHAM.

Practice—Ne exeat—Bail.

Where the plaintiff in an alimony suit obtains a writ of arrest, and the defendant gives bail; and a breach of the bond is committed, the plaintiff is entitled to have the amount for which the writ was marked paid into Court to be applied in payment of the alimony and costs: and *semble* that upon such payment the sureties are entitled to be discharged from their bond.

Where under a writ of arrest a caption takes place, the sheriff is entitled to a bond for double the amount marked upon the writ.

Meredith, for plaintiff.

Bayley, for the sureties.

Ferguson, J.) [Oct. 4.

GRIFFITH v. GRIFFITH.

Will—Construction of—Vested estate—Dying before age of 21.

The testator expressed a desire "to have retained for my children my property on Yonge-street, and for this purpose I desire that the proceeds of my life insurance be applied in the purchase for my daughters' benefit of the incumbrances of that property. Under any circumstances I desire that all my other lands be sold. * * I desire that the proceeds of my estate and rents of my Yonge St. property be applied * * in the support, maintenance, and education of my two daughters and in paying the incumbrances on the Yonge-street property. After paying the necessary charges, my wish is that the interest of my estate be applied by my trustees in the support of my children. Should one of my said two daughters die, or become a Roman Catholic, her share to go to the other, and should both die without issue, or become Roman Catholics, then my estate is to go to my sister L. and her heirs. * * I direct that my trustees shall divide the proceeds of my estate equally between my two daughters, allowing each during their minority, or until the marriage of one or other of them, a sum sufficient to maintain and educate them, and after they come of age an equal share of all proceeds to be secured and paid them free from all control of any husband or any other person." There were only these two daughters children of the testator, and both attained the age of 21 years without having become Roman Catholics.

Held, that the interests taken by the daughters were vested, though subject to be divested upon the happening of the events mentioned before twenty-one; and that at that time the shares vested absolutely in them; so that L. took nothing under the will at present.

TRAVIS v. BELL.

Fraudulent conveyance—Costs.

In a suit to set aside a conveyance on the ground of want of consideration, it being alleged that the grantor was bodily and mentally infirm, the evidence showed that the only difference between the grantor and grantee was that the former was an older man than the other. The grantee, however, had given about the full market value of the land conveyed, and to secure part of the purchase money had executed a morrgage thereon. In dismissing the bill the Court [FERGUSON, J.] directed the costs of the defendant to be deducted from the amount due under the mortgage, if the costs were not paid within a month, it being alleged that the plaintiff was worthless.

IN RE WELLAND CANAL ENLARGEMENT: FITCH v. MCRAE.

Valuation—Compensation to owner—Landlord and tenant—37 Vict., ch. 13.

The Government of Canada, having taken the land of the defendant's testator for the purposes of the Welland Canal, paid into Court, under the statute, a sum awarded by the

valuers, which was intended to cover all claims which the owner might have of any kind; and the owner was to be at liberty to remove buildings, &c.; and on payment of the money to convey free from dower and all other incumbrances including taxes. The plaintiff was lessee of the property so taken and claimed compensation for disturbance.

Held, that the plaintiff was entitled to be compensated out of the money paid into Court, and that his claim was one which the owners was liable, under stat. 37, Vict. ch. 13, sec. 1, to pay, and which he should have taken into consideration, and which the evidence showed had been taken into consideration in the settling the amount to be paid by the government on taking possession of the lands.

Proudfoot, J.] [Oct. 10.

SMITH v. BABCOCK.

Examination—Defendant out of jurisdiction—Practice.

The bill was filed in Lindsay.

The plaintiff resided at Port Hope, his counsel at Toronto. The defendant resided at Montreal, and his counsel at Belleville. The official referee made an order that the defendant should attend at Cornwall to be examined before the local master on the ground that Cornwall was the nearest place in the jurisdiction to the defendant's residence. On appeal,

PROUDFOOT, J., *held* that the case was distinguishable from those where the party to be examined resided within the jurisdiction: (*Gallagher* v. *Gairdner*, 2 Chy. Cham. 480.) Here the plaintiff to be examined resided out of the jurisdiction, and Con. Stat. Can., ch. 79) gave liberty to the party to summons him within it (see *Moffatt* v. *Prentice*, 9 C. L. J. 159. It became then a question at which place in Ontario under the circumstances of the case it was most expedient the examination should take place, he thought Toronto. Appeal allowed costs in the cause.

W. Cassels, for the appeal.

Fitzgerald, contra.

CHAMBERS.

Osler, J.] [Sept. 29.

KINLOCK v. MORTON.

Rule 324—Judgment—Execution—Rateable division.

Where it appears that defendant has made or is intending to make a fraudulent disposition of his property, or is so deallng with it as to embarrass the plaintiff in reaching it by execution, the Court will, on a motion under rule 324, upon a proper case being made, order judgment and immediate execution.

In the event of other executions being obtained against the debtor's property before the time at which the plaintiff would be entitled to issue execution as on a judgment in default of appearance, and the amount realized being insufficient to satisfy all parties, a rateable division should be made.

Ogden, for the motion.

Aylesworth, contra.

Mr. Dalton.] [Sept. 30.

HEAD v. BOWMAN.

Rule 91—Joinder of parties—Alternate relief.

Plaintiff sued defendant for flooding his land by means of a mill dam, after the determination of a license to do so. The Great Western Railway had turned the waters of the stream into another channel which was not made deep enough to carry off all the water if the defendant's dam were removed, so that by the act of the Railway Company the plaintiff could not obtain complete relief by succeeding against defendant.

Held, that the plaintiff should have liberty under rule 91 to add the Railway Company as defendants.

J. G. Robinson, for the motion.

Aylesworth, contra.

Osler, J.] [Oct. 1.

IN RE ONTARIO BANK v. HARSTON.

Division Courts Act, 1880,—Prohibition—Territorial division—Unorganized tract.

The Division Court's Act, 1880, does not apply to the Division Courts in Territorial Divi-

sions and Unorganized Tracts, and a prohibition was ordered to restrain a stipendiary magistrate from adjudicating upon a claim on a promissory note for $110.

Delamere, for the motion.

Holman, contra.

Proudfoot, J.] [Oct 3.

MCLAREN V. CALDWELL.

Costs paid into Court and payment out.

Where money was paid into Court by the defendant as security for costs on certain appeals in the suit, and as security for costs on an appeal from the decree and all the appeals were allowed.

An application to have the moneys so paid in, paid out to the defendant notwithstanding an appeal to the Supreme Court was granted following *Billington* v. *Provincial*, to be reported.

Barwick, for the motion.

Creelman, contra.

Proudfoot, J.] [Oct. 3.

RE CAMERON.

Money in Court—Payment out—Rule 424.

An order was made some years ago by the Referee for the payment out of court to certain infants as they came of age of their shares which had been duly ascertained.

One infant came of age a short time since, but the clerk in the accountant's office refused to issue a cheque without a judge's order under Rule 424.

PROUDFOOT, J., held that under Rule 494 and sub-sec. 2, sec. 11, O. J. A., the order already made by the Referee was sufficient.

Evans, for the applicant.

Mr. Dalton, Q.C.] [Oct. 10.

CRUSO V. BOND.

Mortgage—Foreclosure—Principal—Election.

Plaintiff, a mortgagee, filed a bill for foreclosure of the mortgaged premises, and for immediate payment and possession. Defendant tendered the amount due for principal, interest and costs, but plaintiff refused to take the principal and discharge the mortgage.

Held, that by filing his bill he had made his election to accept the debt, and that he should execute a re-conveyance upon receipt of principal, interest and costs.

Mr. Dalton.] [Oct.

LAWLESS V. RADFORD.

Security for costs.

Replevin for a steam-engine and hay-press The County Court Judge made an order that the sheriff should hold the articles subject to the order of plaintiff. The defendant now applied for an order under sec. 9 of R. S. O., cap. 53 to vary this, by directing possession to be given to him. The defendant also applied for security of costs, the plaintiff living out of jurisdiction, and the writ issued since the 21st Aug., did not shew residence of plaintiff. It appeared by an affidavit of the sheriff that he had not received the bond provided by sec. 11.

H. Symons, for motion.

A. Cassels, *contra*, objects as to motion for security, that the affidavit of plaintiff upon which the writ was obtained, shewed that plaintiff resided out of jurisdiction, and that the order could be obtained upon prœcipe under R. 431, the *affidavit* being the proceeding by which the action is instituted. The seizure also is regular, as it is not absolutely necessary that a bond should be given.

MR. DALTON.—The defendant should have security for costs, and his motion is regular, the writ is the proceeding by which the suit was instituted, and not *the affidavit* and as the writ does not shew plaintiff's residence the defendant is justified in coming here. The seizure I must set aside altogether. It was an improper thing for the sheriff to seize until he had received the bond. Sec. 11 says expressly that a sheriff is not to seize until the bond is furnished, and no Judge's order can waive this. I will make an order to set aside the seizure, and directing the sheriff to re-deliver the goods *to defendant*, and will reserve question of costs of the application until the sheriff is before me. I do not know now whether we or the plaintiff should pay them.

Order to go for security for costs in usual form.

Proudfoot, J.] [Oct. 10.

DAYER v. ROBERTSON.

Time for appealing—O. J. A. Rule 427 (*c*).

Judgment on an application for security for costs was delivered on the 29th Sept., 1881. The order was issued on the 1st Oct. following.

The plaintiff appealed on Monday, October 10th, and the appeal came up.

Watson, for defendant (respondent), objected to the appeal being heard, on the ground that the terms of rule 427 (c) requiring the motion to be made within eight days from the making of the decision complained of (no further time having been obtained).

McPhillips, contra.

PROUDFOOT, J., dismissed the appeal without costs, without prejudice to plaintiff's right to make an application under Rule 462.

REPORTS.

RECENT ENGLISH PRACTICE CASES.

(Collected and prepared from the various Reports by A. H. F. LEFROY, ESQ.)

HARMON v. PARK.

Imp. Jud. Act, 1873. *s.* 19—*Ont. Jud. Act. s.* 13, 14, 15.

Municipal election petition—Court of Appeal.

An appeal lies to the Court of Appeal from an order of the Common Pleas Division upon an interlocutory matter arising out of a municipal election petition.

[C. of A., Dec. 15, 1880—19 W. R. 750. C. P. D.]

This was a case of a petition against the election of one Park as Councillor of one of the wards in the borough of Sunderland. The petitioner, a rival candidate, made the Mayor respondent with Park.

STEPHEN, J., at Chambers, made an order to dismiss the Mayor from the petition, on the ground that, not being a returning officer, he was improperly joined. The order was reversed by the C. P. Div., and the Mayor thereupon appealed.

Counsel for the petitioner objected that the Court had no jurisdiction to hear the appeal, for that by the Imp. Corrupt Practices (Municipal elections) Act, 1872, s. 15, Subs. 4 and 7, (cf. R. S. Ont., c. 174., sec. 199), the decision of the Superior Court is made final.

Counsel for respondent urged that these sections do not apply to questions of procedure or interlocutory matters, and referred to rule 64 of the General Rules made under the Act.

LORD SELBORNE, C., after adverting to the fact that the Judicature Act was passed after the Municipal Act of 1872 and transfers to the High Court all jurisdiction vested in the Common Pleas, including that vested under any special act, (cf. Ont. Jud. Act, Sec. 9., Subs. 2), went on to observe:—

"This matter was brought before a Judge at Chambers, not sitting as an election Judge or as a Judge of the C. P. Div.; this was done under rule 44, drawn up under the Municipal Elections Act, 1872, by which rule all interlocutory matters arising out of proceedings under the Act may be heard and disposed of by any Judge at Chambers; and, although this is a special jurisdiction, the matters are to be dealt with by the Judge in the same manner, and therefore subject to the same rules as to appeal or otherwise as matters arising out of ordinary actions; therefore, I cannot say that such matters are excepted from the provisions of section 19 of the Judicature Act, 1873, especially as the Corrupt Practices Act expressly provides what decisions are to be final."

BAGGALLAY, L. J., concurred.

BRETT, L. J., If this were an appeal from a decision of the C. P. Div. upon a petition, it is clear we could not hear it. If it were an appeal upon any matter arising in a petition after it had been properly instituted, or upon any matters which could only have been brought before an election Judge, as such I should have doubted. But the question is whether the petition is properly instituted, and thus may be heard by any Judge of the High Court under the order referred to, and as the decision of the Judge

* It is the purpose of the compiler of the above collection to give to the readers of this Journal a *complete* series of all the English practice cases which illustrate the present practice of our Superior Courts, reported subsequently to the annotated editions of the Ontario Judicature Act, that is to say since June, 1881.

of the High Court as such it s subject to appeal under sec. 19 of the Jud. Act, 1873.

[NOTE.—*The provisions of Imp. J. A.* 1873, *sec.* 19, *are comprised in terms virtually identical in Ont. J. A.. secs.* 13, 14, 15.]

POYSER v. MINORS.

Imp. O. 41, *r.* 6, *O.* 36, *r.* 18—*Ont. O.* 37, *r.* 6, (*No.* 330.) *O.* 31, *r.* 15, *No.* 268.

[C. of A., June 30.—19 W. R. 773.
L. R. 7 Q. B. D. 329. 50 L. J. R. 555.

The order the interpretation of which was in question in this case, was Imp. Co. Ct. Rules 1875, O. 16, r. 17; but this County Court rule is a copy of Imp. O. 41, r. 6, Jud. A. 1873, and it is to be noted that the judgments contain some lengthy observations on the said O. 41, r. 6, which is virtually identical with our Order 37, r. 6.

The following passage occurs in the judgment of BRAMWELL, L. J. :—

"This rule (O. 41, r. 6, J. A.) has always been a difficulty to me. It supposes a "judgment" of non-suit may be given. There really in strictness never was a "judgment" of non-suit. No plaintiff could be non-suited against his will. * * * * If he insisted on appearing, he could not be non-suit. The expression then, "judgment of non-suit" seems inaccurate. But setting aside this difficulty, which, were it necessary, I could show is not merely verbal, I have never been able to see when under the other rules a non-suit can happen. I need not discuss non-suits before trial. None are provided for by the rules. Now, what is to happen at the trial? By O. 36, r. 18." (Ont. O. 31, r. 15, No. 268) "if plaintiff appears and defendant does not, plaintiff may prove his claim. What is to happen if he does not is not said. I should have thought verdict and judgment for defendant if the case was before a jury, judgment for him if not. Was it contemplated that a Vice-Chancellor should non-suit? Suppose plaintiff insists on appearing? What is the use of a non-suit if it is a bar to a future action unless ordered to the contrary? And if it may be, and is, why could not the power be given to the judge or Court to say that any judgment of whatever kind should not be a bar if so ordered? * * Rule 18 seems the only one under which such a judgment (*i.e.*, of non-suit) can be given. * * It seems strange that such a judgment can be given only where the plaintiff appears and defendant does not. I cannot but doubt whether O. 41, r. 6, did not slip in *per incuriam* and whether it can be applied, now especially. However there it is, and it has been acted upon and probably would be supported if possible."

[NOTE.—*Imp. O.* 41, *r.* 46, *and O.* 37, *r.* 6, *are virtually identical; and Imp. O.* 36, *r.* 18, *and Ont. O.* 31, *r.* 15, *are identical.*]

BECKET v. ATTWOOD.

Appeal by one plaintiff—Co-plaintiff refusing to join in appeal.

One of two plaintiffs may appeal, although his co-plaintiff refuses to join in the appeal. The co-plaintiff should be made a respondent.

[C. of A., May 10—29 W. R. 786. 44 L.T. 660. 50 L.J.R. 637

In this matter one of the plaintiffs appealed. The other refused to join in the appeal, and was therefore made a respondent.

In support of the objection that the appeal was defective was cited *Drake* v. *Symes*, 9 W. R. 427, 3 De. G. F. & J. 491, and *Jopp* v. *Wood*, 2 De. G. J. &. S. 323, 13 W. R. Ch. Dig. 76.

In support of the appeal were cited *Colvin* v. *Hartwell*, 5 Cl. and Fin. 484; *Hanson* v. *Keating*, 4 Ha. 1, and 2 Seton on Decrees, 1605.

JAMES, L. J.—The objection must be overruled. If one plaintiff is dissatisfied with the judgment of the Court, he ought not to be prejudiced in his right to appeal, simply because his co-plaintiff does not wish to risk the consequences of further litigation. If the plaintiff who is made a respondent has any reason to doubt about the security of his costs, if successful, he should apply that the appellant may give security under O. 58 r. 15.

[NOTE.—*Our orders under the J. Act contain no order similar to Imp. O.* 58, *r.* 15, *but cf. R. S. O., c.* 38, *sec.* 26.]

IN RE BROOK: SYKES V. BROOK.

Imp. J. A., 1873, *s.* 56, 58—*Ont. J. A. s.* 47, 49. *Official referee—Objection to report—Notice—Administration action—Costs.*

When questions have been referred to an official referee for inquiry and report, and he has reported, objections may be made to the report on further consideration, but notice of the objections should be given; and it seems two clear days' notice would be sufficient.

[Ch. D. May 13—10 W. R. 820.

In this case after the official referee had made his report, the plaintiff raised the objection to the report, that certain sums claimed by the defendant against the estate and allowed by the referee, ought not to be allowed. This point was raised on the pleadings, the accounts, and the reports.

No notice of this objection had been given.

Counsel for defendant raised the preliminary objection that it was too late to vary the report, and that for the purpose of variation, the report is equivalent to the verdict of a jury, and cited *Sullivan* v. *Rivington*, 28 W. R. 372.

FRY, J., however, after calling attention to the fact that Imp. J. Act, 1873, sec. 58 (Ont. J. Act, s. 49), draws a distinction between two classes of cases, and the latter part only speaks of a trial, gave judgment as follows:—

"It is clear that I cannot object to hear the plaintiff when he says that the report of the official referee is wrong, because sec. 56 of J. A. 1873 says the report of the referee may be adopted wholly or partially by the Court. Now, that report does not come before the Court except on further consideration, because on that occasion the question arises whether the report shall or shall not be adopted by the Court; yet, undoubtedly great inconvenience will arise if points on the report are to be argued without any intimation on the part of the person who makes that objection. Therefore, I shall order the case to stand over if the defendant desires it. I cannot lay down any general rule as to what length of time should be allowed for notice of objection. I think two clear days would be desirable."

A further question arose in this case on the subject of costs. The facts were these: Beneficiaries under a will brought an action against B., who was trustee and executor, asking for execution of the trusts, administration, relief in respect of alleged breaches of trust, appointment of a new trustee and a receiver. A receiver was appointed. When the action came on for trial, an order was made referring certain questions for inquiry and report to an official referee. Some of these questions were common administration inquiries, and the rest were directed to the alleged misconduct of the defendant. The referee reported in favour of the defendant on all points. On further consideration,—

FRY, J., held that the plaintiffs must pay the costs of the action up to and including the further consideration, except such costs as would necessarily have been incurred in obtaining a common administration judgment.

[NOTE.—*Imp. J. A.* 1873, *s.* 58, *is identical with Ont. J. A., s.* 49. *Imp. J. A.*, 1873, *s.* 56, *and Ont. J. A., s.* 47, *are to the same effect, but not identical since the latter gives powers to a Co. Ct. Judge, and to a single Judge of a Divisional Court, which do not appear to be given by the Imp. Act.*]

WHEELER V. LE MARCHANT.

Imp. O. 31, r. 11, 12—Ont. O. 27, r. 4, (No. 222) Discovery — Privilege — Surveyor — Information by a Solicitor ante litem motam.

Where a solicitor is consulted by a client in a matter as to which no dispute has arisen, and applies to a surveyor or other third party for information necessary that the solicitor may give legal advice to the client, the communications between the solicitor and third party are not privileged from discovery in legal proceedings subsequently commenced by or against the client.

[C. of A., April 6—44 L. T. 632, L. R. 17 Ch. D. 675.

In an affidavit as to documents, delivered pursuant to an order to produce, the defendants objected to the production of certain documents on the ground that they consisted of "confidential correspondence between ourselves and our former solicitors, B. R. & B., and our present solicitors, G. R. & Co., and our former estate agent and surveyor Mr. W., and his agent Mr. N. K., and our present estate agent and surveyor, Mr. E., and between such solicitors and agents."

The plaintiff thereupon took out a summons for production for inspection of these documents. This summons was adjourned into Court

and on April 2nd, BACON, V. C., dismissed the summons with costs: he declared the principle to be perfectly distinct and plain—

"A man is not to be so impeded in his transactions whether he is, or is likely to be engaged in litigation or not, as to be prevented from employing a solicitor, first for the purpose of obtaining his advice, and next to collect evidence, or from employing any agent, not being a solicitor, who is engaged for the like purpose. If the defendants take upon themselves to say that those were all confidential communications, what right have I to say that their confidence should be disclosed? The case of *Anderson* v. *Bank of British Columbia*, 15 L. T. N. S. 76; L. R. 6 Ch. D. 644 is totally different. One man there wrote to another, and asked him to send the full particulars of a transaction. That is an act done by which the rights of parties may be influenced. With regard to the cases of reports made by medical officers, such reports are protected from discovery because they are made with respect to the litigation going on. There is no doubt about the law. The general principles laid down by Lord Lyndhurst in the case of *Herring* v. *Clobery*, 1 Phil. 91 in my opinion, cover the whole ground of the right to production."

The plaintiff appealed, and by his notice of appeal stated that he applied for production of the documents, "except such, if any, of the same documents as consist of confidential communications between the defendants and their solicitors."

Counsel for the appellant contended that communications between the defendants and their solicitors and agents before the litigation began, and so far as they were not made for the purpose of defending the action were not privileged, and cited *Anderson* v. *Bank of British Columbia*, supra; *McCorquodale* v. *Bell*, L. R. 1 C. P. Div. 471; *Bustros* v. *White*, L. R. 1 Q. B. Div. 423.

Counsel for the defendants contended that it is immaterial whether any litigation is proceeding or in contemplation, and cited *Herring* v. *Clobery*, supra; *Cromack* v. *Heithcote*, 2 Br. & Bing. 4; *Manser* v. *Dix*, 25 L. T. O. S. 113; 1 K. & J. 451; *Mostyns* v. *West Mostyn Coal & Iron Co.* 34 L. T. N. S. 531; *Minet* v. *Morgan*, L. R. 8 Ch. App. 361; *Southwark & Vauxhal Waterworks Co.* v. *Quick*, L. R. 3. Q. B. D. 315; *Lawrence* v. *Campbell*, 4 Drew, 485; *Macfarlane* v. *Rolt*, L. R. 15 Eq. 580; *Walsham* v. *Stainton*, 9 L. T. N. S. 603; 2 H & M. 1; *Ross* v. *Gibbs*, L. R. 8 Eq. 522; *Cossey* v. *London, Brighton and S. Coast Ry. Co.*, L. R. 5 C. P. 146; *Friend* v. *London, Chatham & Dover Ry. Co.* L. R. 2 Ex. D. 437; *Wilson* v. *Northampton & Banbury Junction Ry. Co.* L. R. 14 Eq. 477.

The Court reversed the decision of Bacon, V. C., and ordered that the defendants must produce the correspondence, except such, if any, as the defendants should state by affidavit to have been prepared confidentially after the dispute had arisen between the plaintiff and defendants, and for the purpose of obtaining evidence and legal advice for the purpose of the action.

JESSEL, M. R., after observing that the Counsel for the respondents had fairly admitted that no decided case could be produced which carry the rule to the extent they wished, and that the principle as to protection from discovery was of a very limited character, and after illustrating this by examples, said :—

"The protection is of a very limited character. It is a protection in this country restricted to the obtaining the assistance of lawyers as regards the conduct of litigation or the rights to property. It has never gone beyond the obtaining legal advice and assistance, and all things reasonably necessary in the shape of communication to the legal advisers are protected from production or discovery, in order that legal advice may be obtained safely and sufficiently. Keeping that in view, what has been done is, that the actual communication to the solicitor by the client is of course protected, and it is equally protected whether that communication is made by the client in person to the solicitor in person, or is made by an agent on behalf of the client, who obtains the advice from the client for the solicitor. It would extend also to a clerk or subordinate of the solicitor who acted in his place or under his direction. Again, with the same view, the evidence obtained by the solicitor, or by his direction, or at his instance, even if obtained by the client, is protected after litigation has been commenced or threatened, or with a view to the defence or prosecution of such. So again, it does not matter whether the advice is obtained from the solicitor, as to a dealing which is not the subject of litigation.

What is protected is the communication necessary to obtain legal advice. It must be a communication made to the solicitor in that character and for that purpose. But what we are asked to protect here is this: the solicitor being consulted in a matter as to which no dispute has arisen, thinks he would like to know some further facts before giving his advice, and applies to a surveyor to tell him what the state of a given property is, or information of that character, and it is said that that ought to be protected because the information is desired or required by the solicitor in order to enable him the better to give legal advice. It appears to me that is not only extending the rule beyond what has been previously laid down, but beyond what necessity warrants."

BRETT, L. J., was of a like opinion. He also observed that *Mostyn* v. *West Mostyn Coal & Iron Co. supra* gives no colour at all to the proposition put forward for the approval of the Court by the respondents, and that *Wilson* v. *Northampton & Banbury Junction Ry. Co. supra* is wrong, unless there was inadvertence as to some of the documents there shut out from information.

COTTON, L. J., was also of like opinion, and observed that it "is not necessary in order to enable persons freely to communicate with their solicitors and obtain their legal advice, which is the foundation of the rule, that any privilege should be extended to communications such as these." He also points out that when it is said that communications between the "*representatives of the client*," and the solicitor are privileged, what is meant by the word "representative" is a "person employed as an agent on the part of the client *to obtain the legal advice of the solicitor*."

[NOTE.—*Imp. O.* 31, *r.* 11, 12, *and Ont. O.* 27, *r.* 4, *both relate to discovery and production, but are not identical.*]

DICKS v. YATES.

Imp. J. A., 1873, *s.* 49—*Ont. J. A.*, *sec.* 32.

Appeal—No order except that defendant shall pay costs.

In an action for infringement of alleged copyright in the title of a novel, the defendant, before trial, discontinued the use of the title. At the trial the Judge held that the plaintiff had established his claim to copyright, and that the defendant had invaded it, but he made no order except that the defendant should pay the costs of the action.

Held, that this was not an "order as to costs only" under sect. 49 of the J. A., 1873, and that the defendant could appeal against the order.

[C. of A., July 9.—44 L. T. 662.

The above head-note sufficiently shows the facts of this case. At the trial, Bacon, V. C., who held that the whole copyright of a work entitled "Splendid Misery" was vested in the plaintiff; that the title was part of it; and that that title being the property of plaintiff, had been adopted unintentionally by the defendant; said that it was unnecessary to grant an injunction, and merely ordered the defendant to pay the costs of the action.

On appeal, counsel for respondent argued there was no right of appeal under above section of the Act, and cited,—*Re Hoskin's trusts*, L. R. 5 Ch. App. 281; *Ashworth* v. *Outram* (No. 2), L. R. 5 Ch. D. 943; and endeavoured to distinguish *Wilt* v. *Corcoran*, L. R. 2 Ch. D. 69.

Counsel for appellant relied on *Wilt* v. *Corcoran*, and also cited *Harris* v. *Aaron*, L. R. 4 Ch. D. 749.

JESSEL, M. R., held the objection could not prevail, and said:—

"Are costs, so given, costs by law in the discretion of the Court, if the plaintiff has no title? It seems to me that is not so. No one has ever heard of such an order, nor did the V. C. make such an order. The V. C. decided that the plaintiff had a title, and thereupon he ordered the defendant to pay the costs. That is the decision which is really appealed against. It seems to me that it makes no difference whether there is an actual declaration in the order that the plaintiff was entitled, or whether it was a necessary inference from the form of the judgment ordering the defendant to pay costs. It comes to the same thing. It is a decision that the plaintiff was entitled to bring the action, and therefore this is not a mere appeal for costs. I wish not to be misunderstood. I think the Court has a discretion to deprive the defendant of his costs, though he succeeds in the action, and that it has a discretion to make him pay, perhaps, the greater part of the costs, as regards issues on which the

defendant fails, or in respect of misconduct by the defendant in the course of the action. But, in my opinion, a judgment like this, for the whole costs of the action, cannot be supported without an express or implied decision that the plaintiff was entitled to bring the action. Therefore I think the appeal should proceed."

JAMES, L. J.—"I am of the same opinion. I should add that there is an essential difference between the plaintiff and a defendant. A plaintiff may succeed in getting a decree, and he may have to pay all the costs of the action; but the defendant is dragged into court."

[NOTE.—*Imp. J. A.*, 1873, *sec.* 49, *and Ont. J. A.*, *sec.* 32, *are identical.*

RANSON v. PATTEN.

Imp. J. A., 1873, *sec.* 52, *O.* 50, *r.* 4—*Ont. J. A. sec.* 41. *O.* 44, *r.* 3 (No. 385).

Dismissal of action—Death of plaintiff—Appeal,—Revivor.

[C. of A., May 20—44 L. T. 688.

This action was tried before Bacon, V. C., when he gave judgment of the foreclosure claimed by the plaintiff, and dismissed the counter-claim with costs.

The defendant gave notice of appeal, and after it had been set down for hearing, died. His executrix obtained an order of course on petition at the Rolls under Imp. O. 50 r. 4, giving leave to continue proceedines.

Counsel for respondents raised the preliminary objection that the executrix ought to have applied to the Court of Appeal, under Imp. J. A., 1873, sec. 52.

JESSEL, M. R.—Under the practice of the Court of Chancery the suit was revived by bill of revivor in the original Court. This is a proceeding in the action. The only proceeding there is in the action is an appeal. The Court of Appeal has no original jurisdiction, as every appeal is now by way of rehearing. The plaintiff took a very convenient and proper course in obtaining an order at the Rolls.

[NOTE.—*Imp. J. A.*, 1873, *sec.* 49, *and Ont. J. A.*, *sec.* 32 *are identical. Imp. O.* 50 *r.* 4, *and Ont. O.* 44, *r.* 3, *(No.* 385*) are identical, except that under the former the order to add parties, though it may be obtained ex parte, cannot be obtained on procipe.*

WITHAM v. VANE.

Imp. O. 16—*Ont. O.* 12 (*No.* 89-114.)

Third parties—Costs.

Where third and fourth parties had been brought in—*Held*, that there is no jurisdiction to order the plaintiff to pay the costs of the third and fourth parties, and that as there was no disputed question o fact relating to them, but only a question of liability as between the plaintiffs and defendants, there should be no order as to the costs of the third or fourth parties.

C. of A., May 9.—44 L. T. 718.

This was an action on a covenant for payment of a certain sum or rent-charge contained in a deed of sale to the Duke of Cleveland, deceased. After the commencement of the action, the defendants, who were the representatives of the said Duke, brought in as third parties the Hutton Henry Company, who were assigns of part of the land subject to the rent-charge. The Company brought in as fourth parties, Messrs. Horn and Saunders, who under the deed of conveyance to the company had a term vested in them to secure the rent reserved in the said deed to the company, and the company also brought in as fourth parties Messrs. Davis and Greaveson, who by deed of even date with the deed to the company were under covenant to indemnify the company against the rent charge reserved in the original deed to the Duke of Cleveland.

In June, 1880, FRY, J., ordered the plaintiffs to pay the costs of the third and fourth parties, but made no order as to the other costs of the action, considering neither plaintiff nor defendant absolutely in the right.

The plaintiffs appealed, and the defendant gave the usual respondent's notice that the order might be further varied in their favour.

Counsel for the appellants urged that the Judge's order as to costs was irregular, in so far as it directs the plaintiffs to pay the costs of the third parties, and cited *Dawson* v. *Shepherd*, 42 L. T. N. S. 611; *Swansea Shipping Co.* v. *Duncan*, L. R. 1, Q. B. D. 644.

Counsel for the third parties said they did not ask for costs against the plaintiff, but that there was ample jurisdiction to make the defendants pay them, and cited *Dawson* v. *Shepherd*, 42 L. T. N. S. 611, and O. 16 r. 21 (Ont. O. 12 r. 23). They also urged there was no

jurisdiction to make a third party pay a fourth parties costs ; and that it is only through judicial decisions that fourth parties are brought in at all, and there is no provision as to ordering their costs to be paid, and cited *Fowler* v. *Knoop* 36 L. T. N. S. 219; *Witham* v. *Vane*, 41 L. T. N. S. 729 ; *Walker* v. *Balfour*, 25 W. R. 511 ; Imp. J. A. 1873, sec. 24, subs. 3 (Ont. J. A. sec. 16, subs. 4).

Counsel for the fourth parties asked for their costs.

JAMES, L. J.—It appears to me in this case no costs ought to be given to the persons who have been brought in as third and fourth parties. There was a mere question of liability as to what was the construction of the covenant, and and it appears to me that those persons who have been brought in by notice might very well have left the question to be argued by the counsel who appeared for the Duke of Cleveland, and might have given any assistance which they liked. There was no disputed question of fact to be dealt with. I think that it was wrong in point of jurisdiction, for the Judge in the Court below to order the plaintiff to pay the costs of the third and fourth parties. That part of the order will, therefore, be discharged, and there will be no order as to the costs of the third and fourth parties. The action will be dismissed, and the plaintiff must pay the costs of the defendants in the Court below and on appeal. The defendants will have their costs in the ordinary mode.

BAGGALLAY and LUSH, L. JJ., concurred.

[NOTE.—*It is important to notice that under Ont. O.* 12 *r.* 23, *No.* 111. *the Court or Judge is empowered to give directions "as to the costs of the proceedings," where a person not a party to the action is served under the Rules of Order* 12, *and appears pursuant to the notice. Imp. O.* 16 *r.* 21, *is otherwise identical, but does not contain this clause as to costs, hence the decision in Yorkshire Waggon Co.* v. *Newport Coal Co.*, 5 *Q. B. D.* 268. *In the main the rules of Ont. O.* 12 *are identical with those of Imp. O.* 16.]

SPARROW v. HILL.

Costs, taxation of—Plaintiff succeeding upon one of several claims—Apportionment under special order Imp. O. 6, r. 30, 32, August 12, 1875 (costs)—Ont O. 50, r. 20, 22. (Nos. 447, 449).

February 22.—L. R., Q. B. D. 362.

In this case the plaintiff sued in respect of three heads of claim, as to two of which he failed, and as to the third recovered a small sum under the award of an arbitrator.

By the order of the Court judgment was entered for the plaintiff for the sum so found due, and the plaintiff was to recover against the defendants also "such costs as one of the Masters may find he has rightly incurred in recovering the above amount, to be taxed, and that the defendants recover against the plaintiff such costs as they have rightly incurred in defending themselves on those points on which they have succeded, to be also taxed.

The Master, on taxation, allowed the plaintiff the general costs of the cause, disallowing only these items in his bill which applied exclusively to the parts of the claim upon which he had failed to succeed ; and he allowed the defendants only certain of the costs which he had taxed off the plaintiff's bill.

The Court, however, held that the taxation must be reviewed, for the master ought to have allowed to each party the costs applicable to the portion of the claim upon which he or they respectively had succeeded, and apportioned the general costs of the cause.

It was also urged by the plaintiff's counsel that the requirements of rules 30 and 22 of Aug., 1875, (Ont. Nos. 547, 449) had not been complied with as the particular items objected to were not specifically stated in the "objections."

But the Court held that these rules apply only where particular items are objected to, not where the general principle of the taxation is challenged.

In the course of his judgment GROVE, J., said :—

"The Master has not apprehended the principle upon which the order was framed. The order evidently meant something ultra the ordinary course of taxation ; it intended that each party should recover his costs so far as each item applied exclusively to matters upon which he had succeeded, and that the general costs applicable to all the matters should be appor-

tioned. Rules 30 and 32 of O. VI. R. S. O. (cosst) 1875, apply only where specific objections are made to particular items. Here the objection was not to specific items as such, but to the principle upon which the whole bill was taxed. *Knight* v. *Pursell*, 49 L. J. (ch.) 120, is a strong authority in favour of the view the Court is taking. * * * * Such portion of the defendants' costs should be allowed to them as were rightly incurred by them in defending themselves on the points on which they succeeded, not the general costs of the cause, but a proper apportionment on the principle I have stated.

A judgment to same effect was given by LINDLEY, J., who observed that the master seemed to have taxed the plaintiff's and the defendant's bills upon different principles, whereas the order uses the same words as regards both bills, and both bills should have been taxed from beginning to end upon the same principle:—"The bills must be referred back to be re-taxed according to the rule adopted in *Knight* v. *Pursell*, not as to the proportions, but according to the general principle there laid down; the costs of the summons and of this motion to be allowed to the defendants."

Dugdale.—Costs are seldom, if ever, allowed where there has been a mistake of the master.

LINDLEY, J.—That rule is no longer applicable since the Judicature Act, 1873.

Order accordingly.

[NOTE.—*Imp. O. 6, r. 30, 32, Aug. 1875 (costs), are identical with Ont. O. 50, r. 20, 22, Nos. 447, 449.*]

FOWLER v. FOWLER.

Solicitor's Lien—Subpœna duces tecum—Inspection.

May 17—50 L. J. R. 686.

In this case a solicitor had been served with a *Subpœna duces tecum* to attend as a witness on behalf of the plaintiff, and to produce a certain marriage settlement which he had prepared, and which it was necessary to inspect.

When called he stated in the witness box that he had been employed by the plaintiff to prepare the settlement in 1873, but objected to produce it, as he had not been paid his costs for preparing it.

Counsel for plaintiff urged that the witness could not set up his solicitor's lien against the plaintiff, and cited *Locket* v. *Cary*, 10 Jur. N. S. 144; *Hope* v. *Liddell*, 7 De. Gex, Mand. G. 331.

KAY, J., referred to *In re Gregson*, 26 Bea. 87; *In re Cameron's Coalbrook Ry. Co.*, 23 Bea. 1, and held that the witness was bound to produce the settlement for the plaintiff's inspection.

CORRESPONDENCE.

Licensed and Unlicensed Practitioners.

To the Editor of the CANADA LAW JOURNAL:—

DEAR SIR,—My attention has been called to some editorial remarks in your journal of the 15th inst., and which severely criticise an advertisement of mine appearing in a country newspaper.

I may say that the said obnoxious advertisement has only appeared three times, so it has not yet had time I hope to do a great deal of harm. I have taken it out and it will hereafter simply read: "F——R——Law Offices W——and B——."

There being two other lawyers besides myself in each of the towns in which I practice, I can easily guess the "four sources" from whence you derived your information.

As you have editorially criticised me in your journal, and as your journal is the popular organ of the profession in this Province, I hope you will allow me through the same medium the privilege of saying a word or two in self defence.

I admit that the publishing the said advertisement was and is strictly considered a breach of professional "ethics" as conventionally allowed, especially when viewed from a city practitioners standpoint, but a country solicitor will be able on reflection easily to understand the position.

CORRESPONDENCE.

I have written several letters to your valuable journal as also for the *Mail* under the signature of "A Wingham Solicitor"—setting forth at large the great injury we receive in the country from "unlicensed conveyancers." A perusal amongst others of a long letter of mine appearing in your journal last January (*ante* p. 50), will fully explain this.

Let me say that I am practising in a county which is the stronghold of a legion of "conveyancers." These men do nearly all the conveyancing, nearly all the Division Court business, nearly all the Surrogate Court business, nearly all the notarial business, and even conduct nearly all the sales under mortgage in their vicinity.

I can send you if you wish full particulars of a dozen sales so conducted by unlicensed conveyancers in this neighbourhood, they styling themselves of course "vendor's agents," and not "vendor's solicitors."

These men give advice, collect debts, and act generally as attorneys (the only difference being that they don't pay any fees), having in a great many instances the words "law office" painted on their windows and otherwise advertised. These "pettifoggers" not only do the law business themselves, but "run down" and deprecate professional men in their vicinity, telling their customers not to go to solicitors—they will rob them—charge them exorbitantly, &c.—whilst they (good, honest men !) will do the work as well, and almost for nothing.

I am trying to get a little business out of the hands of these men, and say that I have a right to it *all*, and that they have no right whatever—that as long as I take out my certificate I have the right to do the *whole* of the law business, and not share with them. As it is, they have so lowered prices that to do any work at all one has to do it at their figures, if not below them.

When I say that my advertisement was purposely so worded as to let the farmers know that rather than that these unlicensed men should do the law business of my neighbourhood, I would do it for little or nothing, I think that no solicitor practising in the country, and considering the end I had in view, will be harsh in his criticism.

I again repeat that in the strict eye of discipline it was a breach of ethics.

But, then, why does not the Law Society protect lawyers practising in the country towns and villages ?

When you take away from a country solicitor his conveyancing, his surrogate business, his sales under mortgage, his notarial business and nearly all his Division Court business, what is there left to him ?

And, allow me to say, since County Judges have put so ultra-liberal a construction on the word "agent" in the Division Court Acts—unlicensed men do the bulk of the Division Court work in the country districts, and several instances have I known in which counsel fees were taxed to those unlicensed men, when the Judge so taxing the fee personally knew that the "*agent*" was neither attorney or counsel. If wondering city practitioners should ask how those men not being licensed come to be able to take the business from men who are licensed, the answer simply is :—These men are all men of great local influence and connection—(*apropos* I may say, that both our members, *Farrow*, *M.P.*, and *Gibson*, *M.P.P.*, are "conveyancers," the one in Bluevale and the other in Wroxeter) ;—and are, with very few exceptions, *magistrates*, nearly all are *notaries*, and they are all *commissioners for taking affidavits* ; a great many are private bankers and money lenders.

They resided in the county long before solicitors came into it—they have grown up with the country, and have the confidence of the old settlers—they in fact got the business before any lawyers came here, and they mean to hang on to it and keep it in spite of the Law Society, or, as Mr. Scott (a "prominent" conveyancer here, who keeps several clerks writing for him) told me when I came here, "We have a vested interest in the conveyancing !"

Then these men hold themselves out to be, and are popularly considered to be, "lawyers," and they would do work for nothing rather than that a certificated lawyer should get it to do ; they misrepresent solicitors practising in their vicinity; they use all the influence they can bring to bear to hurt their business, and frighten the ignorant farmer from going to a lawyer. And these men will do the work till they are stopped by legislative enactment, and they openly say so.

In conclusion, I would like distinctly to say through the medium of your journal, that my advertisement was not intended to help me in taking work out of the hands of *my fellow*

county practitioners, as you seem to suppose; but my only and sole aim was to try and get the business, or a part of it, *from these unlicensed men who have no right to any of it.*

I am sure that every lawyer practising in my neighbourhood will admit that no one has struggled harder for the rights of the profession in the premises than I have done.

Suffice it to say that this obnoxious advertisement, which only appeared three times, will never appear again; and though not believing that in every case "the end justifies the means," yet I think I have, under the particular circumstances above explained, some ground for trusting that you will in your issue containing this letter slightly modify your very severe criticism.

Apologizing for taking up so much space in your valuable journal,

I am, &c.,

FRED. ROGERS,

Wingham and Brussels.

September 28, 1881.

LATEST ADDITIONS TO OSGOODE HALL LIBRARY.

MERCHANT SHIPPING: A compendium of the Law of Merchant Shipping; with an appendix containing all the Statutes, Orders in Council and Forms of Practical Utility, by F. P. Maude, and C. E. Pollock, Esquires, of the Inner Temple, Barristers-at-law. Fourth edition, by the Hon. Baron Pollock, one of the Judges of Her Majesty's High Court of Justice, and Gainsford Bruce, of the Middle Temple, Esq Two volumes: Henry Sweet, London, 1881.

SURETIES AND GUARANTORS: A treatise on the Rights, Remedies and Liabilities of Sureties and Guarantors, and the Application of the Principles of Suretyship to persons other than Sureties, and to Property liable as surety for the payment of money, by Edwin Baylies, Counsellor-at-law: Baker, Voorhis & Co., New York, 1881.

FLOTSAM & JETSAM.

AN Illinois citizen brought his daughter's young man before a justice for violently ejecting him from his own parlour one Sunday evening. After hearing the other side, the justice said: "It appears that this young fellow was courting the plaintiff's gal, in plaintiff's parlour; that plaintiff intruded, and was put out by defendant. Courting is a public necessity, and must not be interrupted. Therefore, the law of Illinois will hold that a parent has no legal right in a room where courting is afoot. Defendant is discharged, and plaintiff must pay costs.—*Virginia Law Journal*

THE Supreme Court of California, in a recent case, Fratt *v.* Whittier, rendered a decision upon the much-mooted question of fixtures, holding that chandeliers were permanent parts of a building. The decision seems to have been based upon the intention of the parties, as gathered from the written and oral testimony. The conclusion of the court in this case seems to be at variance with that of the N. Y. Cour of Appeals, in McKeage *v.* Hanover Fire Insurance Co., where chandeliers attached to gas pipes running through the house, were held not to be fixtures so as to pass with the realty.

ENGLISH JUDGES.—Recent deaths of judges suggest some reflections upon the thorough change which a few years have produced upon the bench. Within twelve years every judge on the common-law side has died, retired, or been promoted. To take the Queen's Bench, Lord Chief Justice Cockburn and Justices Shee and Quain have died; Justice Blackburn has become Lord Blackburn, Justice Lush has become a lord justice. Sir John Mellor has retired, and Sir James Hannen has gone to the Divorce Court; in the Exchequer, the Chief Baron, Barons Channell, Piggot, and Cleasby, have died; Baron Bramwell has become a lord justice; in the Common Pleas, Chief Justice Erle retired, and Chief Justice Bovill died, and Justices Willes, Keating, Honyman, and Archibald died; Justice Brett has become a lord justice, Justice Byles has retired, and justice Montague Smith has been promoted to the Privy Council.

On the equity side, death and retirement have produced the like effect. Lord Chelmsford, Lord Chancellor, Lords Justices Turner, Knight-Bruce, Rolt, Giffard, James, and Thesiger died; Lord Romilly died; Vice Chancellors Stuart, Kindersley, and Malin retired; and Vice Chancellor Wickens died. *Law Times.*

Canada Law Journal.

VOL. XVII. NOVEMBER 1, 1881. NO. 20.

DIARY FOR NOVEMBER.

1. Tu...Harrison, C. J., died. Second Intermediate Exam
2. Wed..Second Intermediate Examination.
3. Thur..Draper, C. J., died 1877. First Intermediate Exam.
4. Fri..First Intermediate Examination.
5. Sat...Sir. J. Colborne, Lieut.-Governor, U. C., 1838.
6. Sun..*21st Sunday after Trinity.*
8. Tu..Primary Examination. Court of Appeal sittings begin.
9. Wed..Primary Examination.
10. Thur..Primary Examination. University Men.
13. Sun..*22nd Sunday after Trinity.*
16. Wed..Wilson, J. Q. B., & Gwynne, J. C. P. 1868. Final
17. Thur..Final Examination for Call. [Exam. for Attorney.
18. Fri..Hagarty, C. J., sworn in C. J. of Q. B. Wilson, J. [sworn in C. J. of C. P. 1878. Final Exam.
19. Sat..
20. Sun..*23rd Sunday after Trinity.*
21. Mon..Michaelmas Term begins.
25. Fri..Lord Lorne, Governor-General of Canada, 1878.
27. Sun..*Advent Sunday.* Cameron, C. J., sworn in Q. B.,
28. Mon. [1878.
30. Wed..Moss. appointed C. J. of Appeal, 1877.

TORONTO, NOV. 1, 1881.

WE have much pleasure in calling the special attention of our readers to an article in this issue, contributed by Mr. Alpheus Todd, C. M. G., the learned author of the well known works on Parliamentary Government in England and the Colonies, upon the subject of the proper constitutional method of dealing with complaints against the Judiciary. In addition to its intrinsic merit, the article will be read with especial interest in he light of recent events in Manitoba.

The *Law Journal* (Eng.) reproduces, in one of its latest numbers, an interesting and kindly letter recently written by Lord Justice Bramwell to the author of an article in the *Central Law Journal* of St. Louis, who sustained the view expressed by him in *Osborne* v. *Gillett*, 42 Law J. R., Exch. 53. In that case the learned Baron (as he was then) held that an action was maintainable by a father for negligence, whereby "the plaintiff's daughter and servant" was killed. Kelly, C. B., and Pigott, B., on the other hand, held that the maxim *actio personalis moritur cum persona* applied. A copy of the article was sent to the Lord Justice, who acknowledged it by the letter in question, in which he enclosed a photograph of himself in his judicial wig and robes. The letter was as follows, and well deserves to be placed on record :—

Dear Sir,—I am much obliged to you for the number of the *Central Law Journal*. I have read your article with great interest. I am glad to see that on your side of the Atlantic the law is dealt with on higher considerations than profit and loss. I am somewhat ashamed to think that you, for mere love of our science, have brought more research and learning to bear on the question you discuss, than I did when it was before me as a matter of duty. I am prone to decide cases on principle, and when I think I have got the right one (I hope it is not presumption), like the Caliph Omar, I think authorities wrong or needless. However, it is gratifying to be confirmed by them, as you confirm my opinion in *Osborne* v. *Gillett*. I am also very much gratified by the kind and flattering way in which you speak of me. Perhaps the reason you know me in America as well as you do, is the length of time I have been on the bench—twenty-five and a half years—longer than any one else now living by about four years; so that I have had the time to be more chronicled than any one else, and I suppose I have made an average use of it. I can assure you I am very glad to have the good opinion of lawyers on your side of the water—none the less that they are young. I may, without vanity, say that all the "young ones" at our bar consider me their particular friend. I was in your city in 1853 only one night, during a long vacation ramble; but for the twenty-five and a half years, and about forty-eight more, I would pay

the States another visit. Repeating the expression of pleasure at your communication,

Yours faithfully,

G. BRAMWELL.

COMPLAINTS AGAINST THE JUDICIARY.

Since confederation, several petitions have been presented to the Canadian House of Commons, against certain of the Judges, for alleged misconduct in office. These applications were received pursuant to section 99 of the British North America Act, which provides that "the judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor-General on address of the Senate and House of Commons."

This provision, it need scarcely be said, is similar to the law of England which—ever since the accession of the House of Hanover—has made the judges independent of executive control, and subject to removal only upon an address from both Houses of Parliament.

From the proverbial integrity and uprightness which has distinguished the occupants of seats on the Bench in the Mother Country, it has rarely happened that there has been occasion to appeal to Parliament against a judicial functionary in the United Kingdom. But when such necessity has arisen, the proceedings instituted against the presumed offender have been noted for their gravity, deliberation and decorum. A few leading precedents have served to establish the mode of procedure in such cases, upon lines calculated to ensure the ends of justice, and likewise to uphold the dignity of Her Majesty's Courts.

In the British colonies, prior to the concession of parliamentary government, a remedy against judicial misconduct was provided by recourse to the provisions of an Imperial statute, passed in 1782, (22 Geo. III., c. 75) which declared that the incumbents of all patent offices in the colonies who "shall neglect the duty of such office, or otherwise misbehave therein" should be removable from the same by order of the Governor and Council; subject, however, to the right of appeal to the Crown in Council. Although this Act merely refers in general terms to officers holding commissions from the Crown, and not expressly to judges, it has been held by the judicial committee of the Privy Council to extend to all such functionaries; and it has been repeatedly invoked for the removal of colonial judges for misconduct in office.

Of late years, however, some have doubted whether this form of enquiry into judicial offences could be properly resorted to in colonies entrusted with full powers of local self-government; seeing that they possess means for the redress of such grievances similar to those which appertain to the Imperial Parliament.

This is undoubtedly an important question, which, in whatever way it may be decided, involves conclusions of special interest. It must be remembered that however extensive may be the powers granted to any colony, the Imperial Government has never relinquished the right of entertaining appeals from colonial courts of law. This is a prerogative of the Crown, hitherto maintained inviolate. Its continued existence affords to the colony the inestimable advantage of submitting, in the last resort, to able and experienced judges of the Privy Council, the solution of intricate legal questions. And on the part of the Crown, this is the golden link which joins all parts of the empire together, under the supremacy of the law; a union which it has been the pride of all loyal British subjects to perpetuate.

This fact has a material bearing upon the matter we are now considering: for it is not generally known that the Lords of the Privy Council have distinctly recorded their

conviction, that the grant of a parliamentary constitution to a colony, framed after the English pattern, does not militate against the exercise, by the local executive, of the powers they possess under the Act of 1782, for investigating complaints against the judiciary. These powers remain unimpaired, under every existing form of colonial constitution with the important security against a possibly unfair or illegal decision by the local tribunal, that the defendant can always appeal to the Crown in Council.

Trials before a Governor and Council have one great advantage over the parliamentary method of investigation, namely, that they are capable of speedy determination. Whereas, proceedings undertaken in a local legislature are unavoidably subjected to delay. For it is essential that they should be conducted with due formality and regard to constitutional precedent, such as is uniformly observed, in similar cases, by the Imperial Parliament. The omission of ample notices to all parties concerned, or the neglect of regulations framed for the purpose of ensuring a just and impartial decision, would necessarily invalidate the proceedings, and compel the Crown to refuse compliance with an address for the removal of a Judge.

On the first occasion of resort by the Imperial Parliament to this statutory method of dealing with an offending judge, the prosecution was compelled to be abandoned, after protracted enquiry, which extended over three sessions of Parliament, because it turned out that certain erroneous methods of procedure had been followed.* And in South Australia —a colony in complete possession of the rights of local self-government, upon an attempt, for the first time, in 1861, to obtain the removal of a judge by the constitutional method of a Parliamentary address, the question was found to be attended with similar and insuperable difficulties. Addresses were passed by the Colonial Parliament in 1861, and again in 1866, for the removal of Mr Justice Boothby, but neither of them proved effectual. The Imperial Government attached such vital importance to the principle of judicial independence that they felt it to be their duty to institute a special enquiry into the proceedings had in this case, before advising a compliance with the prayer of the address. For the Sovereign cannot be regarded as a passive agent in such transactions. In acceding to an address for the removal of a colonial judge the Crown is not performing a mere ministerial act, but assuming a grave responsibility. It has accordingly been held, upon such occasions, that the Crown is bound to ascertain the propriety of removal before decreeing that it shall take place.

Thus, upon investigating the procedure upon the addresses against Judge Boothby, the Imperial Government became convinced that his trial had, in both instances, been improperly conducted; that the charges against him had not been formulated with the precision that would have been observed in the Imperial Parliament; that they were not adequately confirmed by evidence, and that the rights of the defendant to be heard had not been sufficiently respected. For these reasons,—and because Her Majesty's advisers were of opinion that the Crown was bound to secure to colonial judges protection against exaggeration and misunderstanding, from whatever source it might emanate—compliance with the address was refused. But to prevent further delay, or any failure of justice, the Secretary of State suggested that recourse should be had to the Imperial Statute of 1782, and proceedings instituted against the Judge before the Governor and Council.

The Executive Council of South Australia at first protested against this conclusion. They declared that it was an undue limitation of their constitutional rights. But the Imperial Government were firm, and finally succeeded in satisfying the local ministers of

* Case of Judge Fox: Todd, Parl. Govt. in England, vol 2, p. 731.

the wisdom of the course advised. Accordingly, sittings of the Executive Council, presided over by the Governor, were held for the purposes of this enquiry. It lasted eight days, and was conducted with decorum and impartiality. The charges against Judge Boothby were proved, and, pursuant to the provisions of the statute, his removal from the bench was ordered. The judge purposed to avail himself of the privilege of appealing to the Queen in Council, but before he could arrange to do so, his troubled career was terminated by death.

This case is instructive. It points to the need for the utmost care and circumspection in attempting to commence an enquiry into the conduct of a judge, whose tenure of office is beyond the reach of executive control. And it affords ample grounds for the belief that the ends of justice are more likely to be satisfied by a resort to the simple and expeditious remedy afforded by the Imperial Act of 1782, rather than by initiating trials—involving the delicate questions of judicial independence, and of the indefeasible rights of persons accused—before a popular assembly, liable to be influenced by party, and naturally impatient of delay, in the pressure of public business urgently claiming its attention. While, on the other hand, the credit of the Bench demands that accusations, which may prove to be utterly groundless, should not be permitted to remain undisposed of a moment longer than is absolutely necessary, lest the reputation and usefulness of the accused should be unwarrantably impaired.

Moreover,—in the event of a colonial Parliament insisting upon the exercise of its undoubted constitutional right of initiating proceedings against a judge within its own walls,—we learn from this case, that Her Majesty would still be advised that the trial must be reviewed by the highest legal tribunal in the Empire, before the consent of the Crown to the removal of a judge could be granted. This position is confirmed by a memorandum on Privy Council practice in the removal of colonial judges, presented to the Imperial Parliament in 1870, which states that "all the forms of suspension or removal which are in use lead by different roads to the same result, viz :—a hearing before the Privy Council."

In commending this subject to the thoughtful consideration of persons who are interested in a matter of such gravity and importance, I would in conclusion quote some further pertinent observations from the official memorandum above cited :—

"It is scarcely necessary to add that, in Colonies having Legislative Assemblies, those Assemblies cannot be deprived of their undoubted constitutional right to address the Crown for the removal of a judge; and the exercise of this right is altogether independent of the course which the Governor of the Colony may think fit to adopt. When the charges against a judicial officer originate with Assemblies, the form of address or petition is perhaps the most correct, though not the most convenient form of proceeding. When the action for removal originates with the Governor, he has the power to give effect to it in his own hands, subject to the control of the Home Authorities.

"The experience of the Lords of the Council," however, is "strongly *in favour* of proceedings by the Governor, subject to a review by the Secretary of State or the Privy Council in England, and they have invariably found, that in the cases in which proceedings have originated with the Local Assemblies, the delay, uncertainty, and expense have been greatly augmented.

"At the same time, when the misconduct charged is purely judicial, and therefore not properly amenable to the decision of the executive authority, acting on the advice of law officers or advisers of inferior rank, it would seem that the due maintenance of the independence of judges requires that judicial acts should only be brought into question before some tribunal of weight and wisdom enough to pronounce definitely upon them; and this function appertains with peculiar fitness to the Privy Council, which, as a Court of Appeal, has to review the decisions of all the Colonial Courts."

ALPHEUS TODD.

RECENT DECISIONS.

The first case in No. 1. of Vol. 5 of the Supreme Court Reports, now before us, is the *Ætna Life Insurance Co.* v. *Brodie*, being an appeal from the Court of Queen's Bench for Lower Canada. The action was on a policy of insurance, which the defendants desired to prove by parol evidence, had been issued, by mistake, for double the amount really intended. This they were allowed to do and obtained judgment. At p. 18 Ritchie, C. J., makes the broad statement that in case of an instrument signed in due course of business, "when from the nature of the transaction it is obvious a fair *quid pro quo* must have been contemplated, if the inadequacy of the consideration is so very gross indeed as to shock the conscience and understanding of any reasonable man, the Court I think, ought to infer, from that alone, mistake, inadvertence or fraud." There is also a noticeably broad statement of the law as to the admission of parol evidence in the judgment of Gwynne, J., (p. 33) where he says: "That there was a mistake in inserting the $2,000 in the policy and in the body of the application also, is a fact which the appellants may establish by any evidence they can adduce, parol or otherwise." But notwithstanding these expressions, it may be observed that there is nothing in the actual facts of this case which makes it conflict with the general rule as to the admission of parol evidence in the analogous case of the question of mortgage or no mortgage, which is deduced from all the Canadian and English cases, in some recent articles on that subject by the present writer, in a contemporary legal periodical. The rule as there arrived at is as follows: "In order to render parol evidence on the question of "mortgage or no mortgage" admissible in Courts of Justice, it is necessary first to show by something *which does not depend upon parol evidence*, that there is reason to believe the instrument, owing to some fraud, mistake, accident or surprise, other than a mistake in law, does not truly speak the agreement made,—or that subsequent dealings have taken place between the parties inconsistent with the fact of the deed being absolute, and causing a fraud to be committed on the mortgagor in case the parol evidence is excluded, and then parol evidence will be received to show what relief ought to be granted." In the case under review there was this extrinsic evidence other than parol evidence, *e. g.*, the memorandum in the margin of the application was for the alleged right amount, though in the body of the application and in the policy the alleged wrong amount was mentioned; and as counsel for the appellants urged,—that, supported as it was by parol evidence, by the premium paid, the published rates of the company, the contemporaneous entry made by the agent in this register of the correct amount, and other facts and circumstances, entitled the appellants to succeed.

The next case is *Welden* v. *Vaughan*, an appeal from the Supreme Court of New Brunswick. This was an action of assumpsit brought by a part-owner of a vessel against certain merchants in England. The plantiff alleged that while he had entire charge of the said vessel as ship's husband, the defendants, being his agents, refused to obey and follow his directions in regard to the vessel, and so broke their agreement. It appeared at the trial that plaintiff had sold a fourth share to E. V., brother of the defendants. The defendants alleged accord and satisfaction, and relied on a letter written by the plaintiff, in which he referred to the fact that the defendants complained of the "eternal bickerings," which they said were not their fault,—and then reiterating his complaints, closed with the words: "To end the matter, if your brother will dispose of his quarter, I will purchase it, say for $4,200 in cash." The New Brunswick Court held that the expression "to end the matter" should

be construed as applying to the bickerings referred to, and that there had not been an accord and satisfaction. This decision was upheld by a majority of judges. At p. 42 Ritchie, C. J., "observes that in such cases the Court, unless satisfied, beyond a reasonable doubt that what is put forward as an accord and satisfaction was intended by both parties as such, and that there was an acceptance in satisfaction as an act of the will of party receiving, should not, by a doubtful construction, deprive a plaintiff of an unquestionable legal right which accord and satisfaction assumes he has."

The next case requiring notice here, is the *Mutual Fire Ins. Co.* v. *Frey*, in which it was held on appeal from our Court of Appeal, (1.) That a policy issued by a mutual insurance company is not subject to the Uniform Conditions Act, R. S. O., c. 162, thus upholding the former decision of our Appeal Court (5. App. 87) in *Ballagh* v. *Loyal Mutual Ins. Co.* (2.) That the company under the policy (R. S. O., c. 161, sec. 56) were entitled to three months from the date of the furnishing of claim papers before being subject to an action, and that therefore respondent's action had been prematurely brought.

Lastly, we have the case of *Larue* v. *Deslauriers*. This case decides what Fournier J., calls "a very important question" as to the proper interpretation of sec. 48 of the Dominion Controverted Election Act of 1874. This section, after giving a right of appeal to the Supreme Court, and fixing the mode of giving notice of appeal, gives to the appellant the right of limiting his appeal in these words:—"In and by which notice the said party so appealing may, if he desires, limit the subject of the said appeal to any special and defined question or questions; and the appeal shall thereupon be heard and determined by the Supreme Court, which shall pronounce such judgment upon questions of law or of fact, or both, as in the opinion of the said Court ought to have been given by the Judge, whose decision is appealed from, * * * and the Registrar shall certify to the Speaker of the House of Commons the judgment and decision of the Court upon the several questions, as well of fact as of law, upon which the Judge appealed from might otherwise have determined and certified his decision in pursuance of the said Act, in the same manner as the said Judge should otherwise have done, etc." And the question which now came up for decision was whether, after a first appeal, in which the right of appeal has been limited to certain questions of law or of fact, a second appeal may be had on that part of the case which was withdrawn from the consideration of the Court in the first appeal? In other words, could this Court, under the existing law, at the time of the first appeal, send it back to the lower Court? Should it not rather have reported a final judgment to the Speaker? (See per Fournier, J., 106.

The majority of the court decided that the Supreme Court on the first appeal, could not, even if the appeal had not been limited to the question of jurisdiction, as it was, have given a decision on the merits, because no judgment on the merits had been given in the Court below, and that the order of the Court remitting the record to the proper officer of the Court *a quo* to be proceeded with according to law (for this was the order made on the first appeal), gave jurisdiction to the judge below to proceed with the case on the merits, which latter judgment was properly appealable under the said sec. 48 of Supreme Court Act.

It may be observed also that the opinion is expressed in some of the judgments, as per Ritchie, C. J., p. 102, per Taschereau, J., p. 124, that an Appellate Court in election cases ought not to reverse on mere matters of fact the findings of the Judge who has tried the petition, unless the Court is convinced beyond doubt that his conclusions are erroneous and the observations made to this effect in *Somerville* v. *Laflamme*, 2 S. C. 260, and

in the *Halton* case, 11 C. L. J. 273, to the same effect are approved of.

Passing to the English Law Reports for October, now received, we have before us Appeal Cases, vol. 6., p. 489-656; 17 Chancery Div., p. 721-844; 7 Queen's Bench Div. p., 397-484; and 6 Probate Div., p. 117-126.

Of the first of these a great part is occupied by the *Dysart Peerage Case*, which illustrates the following feature of Scotch Law, viz., that although that law accepts the continued cohabitation of a man and woman as spouses, coupled with the general repute of their being married persons, as complete evidence of their having deliberately consented to marry, yet in order to sustain that inference their cohabitation must be within the realm of Scotland. It may be well also to allude to a point of evidence which arose in the case. B. married C. *in facie ecclesia* in 1851, had issue, and died in 1872. In an attempt by A. to set up a previous irregular Scotch marriage, a witness gave evidence that B. told him repeatedly after 1851, that A. was his wife and not C. The Lords held, on principles common both to English and Scotch law, that such evidence was not admissible.

The remaining four cases are all appeals to the Privy Council, one from Natal, two from New South Wales, and one from Canada. The first named is a fresh authority from the supposition that the Government revenue cannot be reached by a suit against a public officer in his official capacity, thus corroborating *Macbeath* v. *Haldimund*, 1 T. R., 180; *Gidley* v. *Lord Palmerston*, 3 Brod. & B. 285. Their Lordships felt it unnecessary to determine whether the Natal Court would have had jurisdiction if a petition of right had been presented, and the Crown had ordered that right should be done: but they observe *passim* that no practice of the Court can confer upon it any power or jurisdiction beyond that which is given to it by the charter or law by which it is constituted.

The two cases from New South Wales related to the provisions of the Act relating to the alienation of Crown lands in that colony. The second, however, *Turner* v. *Walsh* (p. 636), also decides, in accordance with former cases, that from long-continued user of a way by the public, whether land belongs to the Crown or to a private owner, dedication from the Crown or private owner, as the case may be, in the absence of anything to rebut the presumption, may and ought to be presumed; and their Lordships held that the same presumption from user should be made in the case of Crown lands in the colony of N. S. Wales, apart from the Crown Lands Alienation Act, though the nature of the user and the weight to be given to it vary in each particular case.

The Canadian appeal is *The Connecticu, Mutual Life Insurance Co.* v. *Moore* (p. 644) and is an appeal from the judgment of the Supreme Court, delivered Dec. 13, 1879, reversing a judgment of our own Court of Appeal (3 App. 230), affirming a rule made by the Court of Q. B. (41 U. C. R. 497). It may be remembered that in this case the defendants obtained a rule *nisi*, calling upon the plaintiff in an action upon a policy of life insurance to shew cause why a verdict obtained by her should not be set aside and a nonsuit or verdict entered for them pursuant to the Law Reform Act (R S. O., c. 50., secs. 264, 283), or a new trial had between the parties, said verdict being contrary to law and evidence, and the finding virtually for the defendant; and for misdirection in that the jury had not been directed on the evidence to find for the defendant. The Court of Queen's Bench (41 U. C. R. 497) ordered the verdict for the plaintiff to be set aside, *and verdict to be entered for the defendant*, while the Supreme Court eventually reversed this order and restored the verdict for the plaintiff, being of opinion that, under the Supreme Court Act, 38 Vict., c. 11., sec. 22, they had no power to direct a new trial on the ground of the verdict being against the weight of evidence.

The Privy Council have now held: (1) That although the Court of Queen's Bench would have had power to enter the verdict in accordance with what they deemed to be the true construction of the findings, coupled with other facts admitted or beyond controversy, they had no power to do what they did, *i.e.*, to set aside the verdict for the plaintiff, and direct one to be entered for the defendants in direct opposition to the finding of the jury on a material issue: (p. 653 654). (2) That under 38 Vict., c. 11, (C) the Supreme Court has power to make any order or to give any judgment which the Court below might or ought to have given, and amongst other things to order a new trial on the ground either of misdirection or the verdict being against the weight of evidence; and that power is not taken away by sec. 22 in a case such as this, *in which the Court below did not exercise any discretion as to the question of a new trial*, and where the appeal from their judgment did not relate to that subject. But as remarked p. 655, this question ceases to be of any general importance, as the recent statute 43 Vict. c. 24 (C) enables the Supreme Court to exercise this very power. Referring, however, to R. S. O., c. 38., sec 18, subs. 3., their Lordships observe (p. 655) "that there is a section in the local Act, not precisely in the same terms, but to the same effect, limiting the jurisdiction of the Appellate Court of Ontario, with respect to which they take the same view, in accordance, as they understand, with the view of the Appellate Court of Ontario. (3) That, *although the Privy Council have the right, if they think fit, to order a new trial on any ground*, they would not exercise that power in this case, on the principle stated p. 656 that: "In order to be justified in granting a new trial, they must be satisfied that the evidence so strongly preponderates in favour of one party as to lead to the conclusion that the jury, in finding for the other party, have either wilfully disregarded the evidence or failed to understand and appreciate it." A further reference to this case will be found among our recent English practice cases.

In the October number of the Q. B. Div. most of the noticeable cases are on points of practice, and will be noted in our Recent English Practice cases. At p. 438, however, is a case on the subject of vendor and purchaser—*Johnson* v. *Raylton*, which proceeds on the principle that on the sale of goods by a manufacturer of such goods, who is not otherwise a dealer in them, there is, in the absence of any usage in the particular trade or as regards the particular goods to supply goods of other makers, *an implied contract that the goods shall be those of the manufacturer's own make.* It is remarked by Cotton, L. J., (p. 444) that with the exception of two recent cases in the Court of Sessions there is not either in the decided cases, or in the text-books any authority on the question raised. He therefore decided the case as above, on the ground that a purchaser goes to a particular firm of manufacturers in reliance on his opinion as to the average excellence of the goods manufactured by them. Brett, L. J., agreed in this decision, holding (p. 454) that it is more "consonant with the ordinary simplicity of fair mercantile business, and more in accordance with legal principles to say that he who holds himself out to be a selling manufacturer of goods and does not hold himself out as being otherwise a dealer in such goods, does hold out to the proposing purchaser that what he (the manufacturer) offers to do on an order given to, or contract otherwise made with him for the supply of goods such as he professes to deal in, is that he will supply goods manufactured by him." The two Scotch decisions were the other way, and Bramwell, L. J., expresses concurrence with the majority of Scotch judges, and draws a distinction (p. 447) between (1) cases where a manufacturer's make is a peculiar make, where he has a brand known in the market, or even where he has a known name, where it can be supposed there is any *pretium*

affectionis; and (2) cases of articles of which one maker's make is as good as another's and which have no special repute, or name, or other distinction.

The next case of *Bradford* v. *Symondson*, (p. 456), is a curious one. The defendant, who had insured a cargo by a certain vessel, lost or not lost, for a certain voyage, believing such vessel to be overdue, effected a policy of re-insurance with the plaintiff on the same cargo and risk. Before the policy of re-insurance had been effected, however, the vessel and cargo had in fact arrived safely at the port of destination; but this was not known to either the plaintiff or defendant at the time the policy was effected; and all three judges held that the policy had attached, and that therefore the plaintiff was entitled to the premium at which it had been effected. Brett, L. J., with whom the other judges concurred, declares his opinion (p. 462), that the fact that the question of whether there was a loss or not, was determined before the making of the policy, is no objection to the policy. He points out that all the text-books support this view, and incidentally observes that "of all the great text authorities upon insurance law, Phillips is the one most to be considered."

The cases decided in the October number of the Chancery Division will be reviewed in our next number.

We are compelled from want of space, notwithstanding our fortnightly issue, to hold over much interesting matter, including some cases from the country, and a letter from a subscriber as to practice in County Courts in reference to the examination of parties.

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

Osler, J.] [Oct. 18.

REGINA v. WASHINGTON.

Conviction—Appeal—Jury—Further evidence—Irregularity.

A jury may be granted or refused by the Sessions, on appeal from a magistrate's conviction for violation of municipal by-law.

In this case the appellant offered evidence not before the magistrate. This was rejected by the Sessions, and the conviction amended and affirmed, as and for breach of municipal by-law.

Held, that there was the right to have the evidence taken, and having been denied it, the order of the Sessions was quashed.

Imprisonment, with hard labour, on non-payment of fine imposed, having been awarded with costs, payable to magistrate or prosecutor the sentence was held bad.

Bethune, Q. C., for conviction.

Murphy and *Fullerton*, contra.

Osler, J.] [Oct. 18.

MCEWAN v. MCLEOD.

Consent—Reference—Award—Contract—Measure of damages.

An award made under order of reference by consent may be appealed from.

Defendant's craft was, on 3rd Oct., hired by plaintiff for carriage of salt at so much per ton, the vessel to take in cargo and convey within reasonable time. Some days after defendant wired that the vessel could not go, and to know if a barge would answer. Plaintiff could at this time have got a vessel at the same rate, but waited for defendent's, which got freighted on 25th Nov. The master, however, apprehending bad weather, would not put out, and another vessel could not be got. Plaintiff then disposed of the salt, despatched part by railroad, settling with the consignee the difference

in price between salt he was obliged to buy and contract price. The charge by rail was greater in consequence of the change in mode of carriage. *Held*, that defendent was not entitled to look to plaintiff for damages which he might have recovered if he had chartered a vessel at $1 after the communication by telegraph ; but that plaintiff could recover difference in price paid consignee, both for freight and cartage.

Bethune, Q. C., and *Garrow* for appeal.
W. R. Mulock, contra.

Osler, J.] [Oct. 25.

ROBERTS V. CLIMIE.

Libel—Privilege—License Commissioners.

License Commissioners have no power to pass a resolution preventing the sale of liquor in any tavern, to any person addicted to drink, or the wife, etc., of such person.

C. Robinson, Q. C., for demurrer.
S. Ridout, contra.

Osler, J.] [Oct. 28.

MCKITRICK V. HOLLY.

Insolvent Act, 1875—Deed of composition—Validity.

A deed of composition providing for payment of partnership creditors only, without providing for separate creditors, is held defective.

Walsh, for plaintiff.
Scott, contra.

CHANCERY DIVISION.

Proudfoot, J.] [Oct. 12.

KILLINS V. KILLINS.

Administration suit—Imperfect account—Costs.

In a suit for administration, it appeared that the personal representative had kept very imperfect accounts of the estate, and that those brought into the Master's office had been made up partly from scattered entries and partly from memory.

Held, a sufficient justification for the institution of the suit, and that the plaintiff was entitled to the costs of the suit from the defendant up to the hearing, although no loss had occurred to the estate.

It was also shewn that the personal representative had invested the moneys of the estate in land out of the jurisdiction of the Court as well as on personal security, but no loss had been sustained, all having been repaid by the borrowers.

Held, that these facts did not constitute any ground for depriving her of the costs of suit subsequent to the decree.

W. Cassels, for plaintiff.
Moss, for defendants.

Proudfoot, J.] [Oct. 19.

BANK OF MONTREAL V. HAFFNER.

Demurrer—Mechanics' Lien Act—Mortgagee—Owner.

The plaintiff instituted proceedings to enforce a mechanic's lien, which had been duly registered, and the suit prosecuted. The plaintiff claimed to be entitled to priority in respect of such lien over the claim of a mortgagee—whose mortgage was prior to the contract under which the lien arose—for the amount by which the selling value of the premises had been increased by the work and materials placed thereon. The assignee of the mortgagee demurred on the ground that he was an owner of the land, within the meaning of the Act, and that proceedings had not been taken against him within the time specified by the Act.

Held, that he was not such an owner, not being a person upon whose request, or upon the credit of whom the work, &c., had been done.

Maclennan, Q.C., for plaintiff.
W. Cassels, for defendant.

Proudfoot, J.] [Oct. 19.

STEWART V. GESNER.

Will—Construction of—Mortmain—Mechanics lien.

A will contained this clause :—"I will and desire that the residue of my real and personal estate, being about the sum of $2,800, more or

less, shall be paid to the four Churches of England in the townships of Orford and Howard in four equal parts to each such churches as follows: To Trinity Church, Howard: St. John's Church, Morpeth; St. ——— Church, Highgate, and the proposed new church at Clearville, and to be applied by my executors in the payment of any debt or debts upon each of such churches respectively; and in case of no debt, or their being a balance or residue after the payment of such debt or debts on each of such churches, respectively, then the residue, (if any) is to be paid by my executors to the churchwardens of such church, to be held by them in trust; and said money is to be invested by such churchwardens, and the interest arising therefrom is to be paid to the Incumbent of said church as a portion of his salary or stipend."

Upon a special case stated for the opinion of the Court it was shown that there was a large debt existing on the Morpeth Church for money borrowed on mortgage wherewith to pay off the building debts. The church at Clearville was not built at the time of the testator's death, but some debts were existing in respect of materials and work on the foundation:

Held, (1) that the mortgage debt on the Morpeth Church could not be considered as a building debt; but if it could be so considered the bequest to pay the same would be void, under the statutes of the Mortmain. (2) That as to the Clearville Church, which was in course of erection, the building debts would form a lien on the lands from the beginning of the work under the Mechanics' Lien Act, and the bequest to pay off those debts would therefore be void, unless the work was being performed in such a manner as excluded the creation of a lien on the land. (3) That the bequest for the benefit of the Incumbent would have been valid if the investment had been directed to be made upon realty; but as the trust might be carried out by investing on personalty the bequest was valid if as invested. (4) That the amount to which the Incumbent would be entitled was the residue after deducting the void bequests for debts.

W. Cassels, for plaintiffs.
J. Hoskin, Q.C., for defendants.
Atkinson, for the trustees.

Proudfoot, J.] [Oct. 19

HARDING v. CARDIFF.

Municipal Act — Award — Costs — Railway charters.

There is a distinction between the rights conferred upon municipal corporations and railway companies respectively to expropriate property, the former existing for the public good, the latter being commercial enterprises only. The charters of the latter are therefore more rigidly construed than are the powers of a municipal corporation. Upon a construction of sections 373 and 456 of the Municipal Act a municipal corporation has power to enter upon and take lands for the purposes permitted by the Act without first making compensation to the owner who is not entitled to insist upon payment as a condition precedent to the entry of the corporation.

Where a municipal corporation had so entered and a bill to set aside an award for improper conduct of the arbitrators and inadequacy of compensation failed upon these grounds, the Court (PROUDFOOT, J.) on dismissing the bill ordered the plaintiff to pay all costs the corporation having properly exercised their statutory rights.

Moss, Q. C., for plaintiff.
S. H. Blake, Q. C., for defendant.

CHAMBERS.

Proudfoot J.] [Oct. 12

FOSTER v. MORDEN.

Certificate of Master—Confirmation of G. O. [642.

The Master certified that an application was made to him on notice of motion to disallow the accounts of the defendant filed under his order, as not sufficient in substance and form; that he heard the solicitors of the parties and examined the accounts, and found that they did not comply with his order on certain specified particulars.

The Referee before vacation set aside an order for attachment for non-production of accounts, because this certificate on which the attaching order was based had not been con-

firmed by the lapse of a month from its making before such order issed. On appeal,

PROUDFOOT, J., *held*, that the certificate was written the language of G. O. 642—the result of a deliberate determination upon questions of fact, upon questions properly within the Master's cognizance—hence could not be acted on until confirmed. He thought that if this had been a certificate that no accounts at all had been filed it would not have required confirmation.

Appeal dismissed with costs.

Arnoldi, for appeal.

A. Hoskin, Q. C., contra.

Proudfoot, J.] [Oct. 19.

DAYER v. ROBERTSON.

Appeal—Enlargement of time for—Rule 462.

This appeal has been dismissed without costs, (see page 389), and the plaintiff (appellant) now appealed under Rule 462 for an extension of time for appealing.

PROUDFOOT, J.—In the case now before me there is no doubt that the plaintiff intended to appeal from the order of the Official Referee, but by the mistake of his solicitor thought the time was to be reckoned from the entering of the order, and not from the making of the decision (*Gibb* v. *Murphy*, 2 Chy. Cham. R. 132) and every subsequent step has been promptly taken. I think it a case in which the plaintiff should have leave to appeal without intending to lay down any general rule that in every case the mistake of the solicitor will suffice to cure delay. The plaintiff to pay the costs of the motion.

McPhillips, for the motion.

Watson, contra.

Proudfoot, J.] [Oct. 26.

HARVEY v. G. W. R.

Parties—Joinder of defendants in cases of doubt—Rule 94.

The statement of claim set out that the plaintiff loaded some machinery upon a car of the G. T. R. Company, to be carried by that Company over their line to Toronto, to be there transferred to the G. W. R. Company for carriage to Dundas. That the G. T. R. Company received the machinery and for hire and reward undertook to carry it safely, securely, and with due care, etc., to Toronto, and there to deliver it to the G. W. R. Company for the plaintiff, to be carried to Dundas. That the G. W. R. Company received the machinery from the G. T. R. Company, and for hire and reward undertook to carry it safely, etc., to Dundas.

On the arrival of the machinery at Dundas, the plaintiff paid the agent of the G. W. R. Company the freight demanded under protest. as he claimed that more than the amount of freight was due him for injury done to the machinery during transit, through the negligence of one or other of the Companies. Each Company denied its liability, asserting that the injury occurred while the machinery was under the control of the other, or partly under the control of one and partly the other, but did not deny the fact of the injury.

McMichael, Q.C., for the appellant G. W. R.

W. Cassels, for the G. T. R.

Muir, for the plaintiff.

The Master in Chambers refused to strike out the G. W. R. Company as defendants.

On appeal,

PROUDFOOT, J.—The summons shows two contracts to have been entered into, one by the G. T. R. Company, and the other by the G. W. R. Company through the plaintiff would have had cause of action independent of any contract.

Rule 94 of the Judicature Act provides that in any action, whether on contract or otherwise, where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants to the intent that in such action the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all the parties to the action.

This effects an entire change of the former rule at law, that where persons agreed severally, they could not be joined in an action but must each be sued separately, and the statute must receive a fair and reasonable construction so as to carry out the intention of the Legislature.

Here there is one single subject, the damage caused to the machinery. To entitle the plaintiff to recover, he must indeed prove more than that he must establish that it has been

caused by the neglect of one or other of the defendants or by both. But that is not part of the subject, which is the injury to the machinery.

The possibility of being able to establish this joint liability would seem, of itself, to justify the propriety of joining the defendants in the action.

But, independently of that, the language of the statute is wide enough to embrace just such a case as this, and the decisions that have been made on the English Act would in principal sanction *this* mode of procedure.

I agree entirely with the Master in the construction he has placed on the Act and dismiss the appeal with costs.

Boyd, C.] [Oct. 26.

BELL v. LAUDER.

Security for Costs—Further security.

The usual præcipe order for security for costs had been taken out by the defendant and duly complied with by the plaintiff. Replication was filed on 30th June last, and the cause brought on for examination and hearing before Ferguson J., at the Simcoe sittings in September, but was only partially heard, and adjourned until December next, owing to the judge being required to open the St. Catharines sittings.

The defendant seeing that the costs far exceeded the $400 security given, applied for further security; the official referee refused the application. On appeal,

BOYD, C., thought upon all the circumstances of the case that it would not be just to interfere at this stage, by requiring further security. Appeal dismissed, costs in the cause to the plaintiff.

Plumb, for the appeal.

H. Cassels, contra.

Boyd, C.] [Oct. 26.

CRUS v. BOND.

Mortgage — Foreclosure—Principal— Election.

This case is reported at page 388 *ante*.

Eddis, for plaintiff, appealed from the judgment of the Master in Chambers.

Watson, contra.

The Court, (BOYD, C.,) in a judgment reviewing the question at some length, said, *inter alia:* "The very question has been determined by Esten, V.C., in *Drummond* v. *Guickard*, in Feby., 1864, (Cham. Note Bk., p. 145), as mentioned in *Green* v. *Adams*, 2 Chan. Ch., 134. It does not become the Master or another judge sitting in Chambers, to overrule this decision made so many years ago, and acted on in many cases since. I do not see that any sufficient distinctions exist in this case to distinguish it from the case decided in 1864. The appeal is therefore allowed with costs."

(This judgment has been appealed to the Court of Appeal.)

REPORTS.

RECENT ENGLISH PRACTICE CASES.

(Collected and prepared from the various Reports by A. H. F. LEFROY, ESQ.)*

JOYCE v. METROPOLITAN BOARD OF WORKS.

Rule as to new trial against evidence where damages trifling.

Held, that it is the custom of the court not to grant a new trial on the ground that the verdict is against the weight of evidence where the damages do not exceed £20, except under peculiar circumstances, such as the trial of a right, or where the personal character of a person might be injured.

[June 24, Q. B. D.—44 L. T. 810.

It will be sufficient to quote such portions of the judgments as affect the above point of practice.

GROVE, J.—The damages were £15, and it is the custom, though not altogether invariable, that except under peculiar circumstances the court will not grant a new trial on the ground that the verdict is against the weight of evidence where the damages do not exceed £20,

* It is the purpose of the compiler of the above collection to give to the readers of this Journal a *complete* series of all the English decisions on pleading and practice which illustrate the present procedure of our Supreme Court of Judicature, reported subsequently to the annotated editions of the Judicature Act, that is to say, subsequently to June, 1881.

and I see nothing in this case to take it out of that general rule. No doubt there have been cases where the court has departed from it; and one is obvious, namely, where the action is to try a right. Another is where serious imputations are made upon the personal character of a party, and if the jury by giving small damages injure a man's character and the verdict is against the weight of evidence, no doubt the court will not adhere to the rule, but the court will not depart from the rule without very strong reasons, and I see none in this case.

Lindley, J.—The amount of damages found by the jury is so small that I should be extremely reluctant to grant a new trial on the ground that the verdict is against the weight of evidence.

Stephen J.—On the question of fact the jury have found the damage to be so small, and the judge not being dissatisfied with it, I think we ought not to grant a new trial on the ground that the verdict was against the weight of evidence.

Sparrow v. Hill.

Costs—Taxation—Claim exceeding amount recovered—Apportionment of costs—Special order.

[April 30. C. of A—44 L. T. 917.

This case, the hearing of which in the Court below will be found reported in our last number, came, on the above date, before the Court of Appeal, where it was held (reversing the decision of Grove and Lindley, JJ.) that the master's taxation was right.

Counsel for the plaintiff cited *Field* v. *G. N. Ry. Co.*, L. R. 3 Ex. Div. 261; *Mason* v. *Brentini*, L. R. 15 Ch. Div. 287.

Counsel for the defendant cited *Knight* v. *Purssell*, 41 L. T. N. S. 581, *Heighington* v. *Grant*, 1 Beav. 228; *Hardy* v. *Hull*, 17 Beav. 355; Seton on Decrees, p. 117.

Bramwell, L. J. said that he interpreted the order made by the Court to mean that the plaintiff was to get the general costs of the cause, but not the costs incurred in attempting to recover that which he failed to recover: and that the defendant was to get such costs as he incurred in consequence of the unfounded claims of the plaintiff; and that if there were costs incurred by the defendant which were applicable to the successful as well as to the unsuccessful claims, the master might say that those would have been incurred if the plaintiff's claim had been limited to the amount for which he was successful and disallow them. And he thought the master had taken that view.

Cotton, L. J., also agreed that this was the effect of the order made, which was all that had to be considered; and that the order in *Knight* v. *Purssell*, ubi sup. was entirely different.

Brett, L. J. gave judgment as follows:—

It seems to me that the undisclosed foundation of Mr. Graham's argument was that all the Courts have become Courts of Chancery since the Jud. Acts; and he has read us a lot of cases, forms, and text-books, to show us that there were only two forms of dealing with costs in the Court of Chancery. It seems to me that that undisclosed foundation fails. There were different modes of proceeding in the Courts of Chancery and Common Law, and the costs were dealt with in a different way, and they must be dealt with in a different way still. As regards the costs of an action upon the common law side of the High Court, it is the practice to deal with them very much in the same way as in an old common law action. Be that as it may, authorities cannot help us to construe the order in this particular case. The action here is brought in respect of one cause of action, consisting of three items; the defence is one defence. I agree that it is proper according to the common law view to say that there is only one issue. Upon that the plaintiff succeeded; but he failed as to two of the items, the three items being distinct. This order that we are called upon to interpret is a new form, *sui generis*, standing by itself. But it is an order made in an action upon a builder's account, which was and is still a common law action. The order was made for the purpose of obviating the difficulty that there was only one issue, and directs the costs to be taxed as if there were three issues in the action. If it does mean that, the mode of taxing is perfectly well understood. The plaintiff has succeeded in establishing his cause of action, but has failed in certain issues; he is, therefore, entitled to the costs of the cause, but not to the costs that he incurred solely in respect of the issues on which he has failed; and the defendant is entitled to the costs that he incurred solely in respect of the issuss on which the plaintiff has failed. . . . . I think that

the Master was right in his construction of this order; and, as I have said, it is not one of the two Chancery forms of order, but a new order that we are called upon to interpret.

HART v. HART.

Imp. J. A. sec. 24, *subs.* 5.—*O. J.A.sec.* 16,*ss.*6.

Separation Deed—Interference with pending action—Agreement to refer to arbitration—Jurisdiction.

Where in an arrangement for a compromise and the execution of a deed of separation, entered into between the parties, during the trial of a divorce suit, it was agreed, amongst other things, that the petition and answer should be dismissed, and also that "in case of difference in working out these terms, matter to be referred to Mr. W. and Dr. D."

Held (1) There was nothing in above section of the J. A. to prevent the Court granting specific performance; (2) the clause as to reference to arbitrators did not oust the jurisdiction of the Court.

[June 23-24, Ch. D.—45 L. T. 13.

There were several questions involved in this case, and the judgment of Kay, J., is of great length. Only a note of those portions of it that concern the above points can be here given.

The action was for specific performance under the circumstances mentioned in the above head note.

The first objection raised was that the Court had no power to interfere with the action of the Divorce Court. Kay, J., referred to *Besant* v. *Wood*, L. R. 12 Ch. D.630, pointing out that the section of the J. A. refers to restraining a term "pending action," and he overruled the objection (1) because it was doubtful whether after the agreement in question, which contained the term "petition and answer dismissed," there was any pending action in the Divorce Court at all, (2) because, whether there was any pending action or no, he was not asked for an injunction to restrain it; (3) because there is nothing in the spirit of the above section of the J. A. to make him hold that because the agreement contained that one term, that an action, which at the time the agreement was come to was pending in the Divorce Court, shall be dismissed; the Court is absolutely by that prevented from directing specific performance of the whole agreement or any part of it.

The second objection raised was that the Court should refuse specific performance, because of the stipulation in the agreement, relating to reference in case dispute to certain arbitrators. As to this Kay, J., observed that in the case of this agreement one essential part of it had been to some extent performed, in that the litigation which was in progress had been compromised and put an end to—and, therefore, on the principle acted on in *Milnes* v. *Gery*, 14 Ves. 403, the Court ought to do its utmost to carry out that agreement by a decree for specific performance: and that he had to consider whether there was in the objection raised, such a formidable difficulty as the Court after all cannot get over and must give way to. He then considered at length the case of *Tillett* v. *Charing Cross Bridge Co.*, 26 Beav. 419, and the cases on which that proceeded, and other cases, and said:—

"All these cases seem to me to proceed on one and the same principle—a very simple and intelligible principle—that, when the agreement on the face of it is incomplete until something else has been done, whether by further agreement between the parties or by the decision of an arbitrator, this Court is powerless, because, there is no complete agreement to enforce. Applying that rule to this case, I find here an agreement which is quite, on the face of it, complete. The arbitrators are not to complete it; they are not to supplement any defect in it. That is not the purpose for which they are appointed, but it is merely that, in case of difference in working out these terms, the matter is to be referred to them. . . . In this case the deed is not to be such a deed as Mr. W. and Dr. D. approve, but a deed containing usual covenants, and the agreement is quite perfect and complete in itself without the clause of arbitration; the clause of arbitration is only added as a subsidiary clause in case a difference shall arise, which, as I have said, I cannot and ought not to contemplate as a thing that must inevitably happen. But whether it happens or not I do not think that the case comes within *Tillett* v. *Charing Cross Bridge Co.* or any other of the cases cited on this point, and I do not know of any authority for refusing to grant specific performance of an agreement like this, because of the addition of that clause, that in case of difference, that difference is to be de-

cided by two named persons; and least of all do I hold that the Court is bound to hold its hand on that ground in a case where, as here, there has been part performance of what I consider to be one of the most important stipulations in this agreement."

[NOTE: *Imp. J. A. sec. 24, subs. 5. and Ont. J. A., sec. 16, subs. 6, are identical.*]

REG. V. HOLL AND OTHERS.

Parliamentary elections—Mandamus.

[June 1. 2 Q. B. D.—45 L. T. 69.

Where commissioners appointed, under Imp. 15-16 Vict. c. 57, to inquire into corrupt practices alleged to have taken place at elections, refuse to give a certificate of indemity, under Imp. 26-27 Vict. c. 29. sec. 7., to a witness examined by them in connection with such corrupt practices on the ground of his answers being unsatisfactory, the court will not grant a writ of mandamus to them to do that which *prima facie* they rightly and properly refused to do.

[NOTE:—*R. S. O. c.* 11., *sec* 53, *is an enactment very similar to Imp.* 26-27 *Vict., c.* 29., *sec.* 7.]

RE X. Y. Z.

R. S. O. c. 40., *sec.* 58—*Lunacy—Order for examination by visitors—Place where enquiry by jury held.*

[April 13, and May 7. C. of A.—45 L. T. 97.

In this case a petition in lunacy had been presented and answered, and the solicitors of the petitioner desired an examination of the alleged lunatic, X. Y. Z., by two medical men, to be held at the place where he resided in the country. The solicitors of X. Y. Z., however, declined this, but offered to allow the examination in London in the presence of a shorthand writer, and of another medical man on behalf of X. Y. Z.

The court ordered that two of the Lord Chancellor's visitors should examine X. Y. Z. and report, and that all persons should be restrained from interfering with their visits.

After the visitors had reported, the Court made the usual order for an inquiry before a jury, and that the enquiry should be held at or as near as convenient to the place where X. Y. Z. resided.

On May 7th counsel for X. Y. Z. applied to have this altered, and the inquiry directed to be held in London. It appeared there was a great difference of opinion between the petitioner and his wife, who was the sister of X. Y. Z., as to the propriety of the proceedings in lunacy, and that they all lived in the same house in the country.

Counsel against the motion cited *ex parte Smith*, 1 Sw. 6; *ex parte Southcot*, 2 Ves. sen 402; *ex parte Baker*, 19 Ves. 340.

All three judges agreed that the inquiry should take place in London.

BAGGALLY, L. J.—I think the inquiry ought to take place in London. I do not accept the reason that the expense of holding it in the country will be greater. I put it upon the ground of the very strong family feeling existing in the matter, which, one may very fairly expect, extends to the neighbourhood in which the alleged lunatic lives.

JAMES, L. J.—A jury *de corpore comitatus* is the worst possible jury in a case where there is local feeling.

[NOTE.—*It seems also from some expressions of Cotton, L. J., that in the case of threatened interference by third parties, the Court will, on notice to them, order them not to interfere with the examination of the alleged lunatic by medical men selected by the petitioner and approved by the Court.*]

RE KNAPMAN; KNAPMAN V. WREFORD.

Costs—Probate action and administration action against executrix—Set off of costs by executrix—Incumbrances and assignments.

[C. of A., May 19—45 L. T. 102

Here a testator left £2,000 to be equally divided among certain legatees, and the residuary estate to his executrix absolutely. Certain of the legatees afterwards commenced an action in the Probate Division against the executrix to set aside probate of the will, some of the plaintiffs being married women suing without their husbands; but the executrix obtained judgment with costs. After this some of the same plaintiffs, with other of the legatees commenced an action in the Chancery Division to administer the estate, the husbands of the married women now being joined as plaintiffs, and the executrix

being defendant. The latter then paid the £2,000 into Court. Afterwards on Aug. 1, 1879, the Probate Division ordered the plaintiffs in the Probate action to pay the taxed costs thereof to the executrix, who thereupon obtained a charging order in the administration action against the share in the fund in Court of one party only, not being one of the married women. All the shares in question had been assigned or incumbered before the judgment in the probate action.

On June 26, 1880, an application for the division and payment out of the money in Court was made to Hall, V. C. (43 L. T. N. S. 25) who held, and his decision was now confirmed by the Court of Appeal, that the costs of the probate action were expenses of administration caused by the acts and conduct of the legatees, and proper to be deducted from the legacies themselves, and to be considered a charge upon them as against assignees, incumbrances, and husbands taking in right of their wives, that the executrix had not by payment in of the specific fund resigned any claim she might have against it for expenses of administration, and that she was entitled in priority to all parties claiming, to set off against each share therein, and to be paid the proportionate share of the taxed costs of the probate action.

CONNECTICUT MUTUAL LIFE INSURANCE CO. v. MOORE.

Rule to set aside verdict—Misdirection—New trial—R. S. O. c. 38, s. 18, subs. 3—Privy Council.

[July 5, 6, 7, Privy Cl.—L. R. 6 App. 644.

This case is more fully alluded to in the article on Recent Decisions in the present number. It may be well to note here, however, that it supports the following propositions:—

(1.) It is not in the power of a Court on the return of a rule *nisi* to enter a verdict in direct opposition to the finding of the jury upon a material issue.

(2.) R. S. O. c. 38, sec. 18, subs. 3,—as to there being no appeal to the Court of Appeal in cases where a new trial is granted or refused upon matter of discretion only, applies only where an appeal is brought from a judgment of the Court below in which they have exercised a discretion.

(3.) The Privy Council have the right, if they think fit to order a new trial on any ground, but that power will not be exercised merely where the verdict is not altogether satisfactory, but only where the evidence so strongly preponderates against it as to lead to the conclusion that the jury have either wilfully disregarded the evidence or failed to understand or appreciate it.

[NOTE.—*The portion of the judgment, p. 655, relating to R. S. O. c. 38, sec. 18., subs. 3 is only an obiter dictum, but is pronounced on the analogy of a point actually decided in the case, viz., the effect of the similar sec. 22 of the Supreme Court Act, 38 Vict. c. 11, C. as it stood before the passing of the recent 43 Vict. C. 24. c.*]

FUTCHER v. FUTCHER.

Imp. O. 19. r. 23—Ont. O. 15., r. 17 (No. 141)

Pleading—Allegation of contract—Statute of Frauds—Demurrer.

A statement of claim which alleges an agreement in relation to a matter which comes under the Statute of Frauds, but is silent as to whether it is evidenced by writing or not, is not open to demurrer, though one specifically relying on the statute.

[July 27, 28 Ch. D —19 W. R., 884.

The above head-note sufficiently shows the point in question.

Counsel for demurrer argued that though the defence of the Statute of Frauds cannot be raised by a general demurrer: *Catling* v. *King*, L. R. 5 Ch. D. 660, *Shardlow* v. *Cotterill*, W. N. 1881, p. 2; it can be raised by a demurrer specifically relying on the statute. *Wood* v. *Midleey*, 2 W. R. 301; *Barkworth* v. *Young*, 5 W. R. 156; *Vale of Neath Colliery Co.*, v. *Furness*, 24 W. R. 631.

FRY, J. referred to *Clarke* v. *Callow*, 46 L. J. Q. B. 53; Stephen's Principles of pleading, 7th Ed., p. 140, and disposed of the question thus:—"Before the Jud. Act there was a diversity in the practice at law and in equity. At law it was unnecessary to allege writing in a case which required writing under the Statute of Frauds. That conclusion was arrived at by the courts on the principle stated in 1 Saand

276, note 2. . . . . Quite a different practice prevailed in equity. The court required a plaintiff, who relied on an agreement which came within the statute, to allege writing satisfying the statute. The principle is expressed by V: C. Kindersley in *Barkworth* v. *Young*, (ubi sup.) From the difference in the requirements as to allegation between law and chancery there followed a difference as to the power of the statute by demurrer. As the plaintiff was required to state writing in chancery, if he did not do so his bill was demurrable. As he was not so required to state by declaration at law, the absence of the statement could not be taken advantage of by demurrer. Thus matters stood before the Jud. Act. Imp. O. 19., r. 23 provides:—[His Lordship read the rule.] That rule, I think, implies that the allegation of a contract simply throws on the defendant the burden of alleging the Statute of Frauds. The result of that rule is twofold. It abolished the old rule in chancery that writing must be alleged, and it abolished the old rule of law, according to which the point might be raised at the trial, even if no notice had been given of the intention to do so. Therefore it leaves it open to allege a mere contract, and requires the defendant, if he intends to raise the point, to do so by his pleadings."

Demurrer over-ruled with costs.

[NOTE:—*Imp. O. 19, r. 23., and Ont. O. 15., r. 17, are identical.*]

WE regret to record the death of Mr. W. M. Ross, Clerk of the Process, on the 28th ult. Mr. Alex. Macdonell has been appointed temporarliy to the position. It has been said that the Government propose abolishing the office. There certainly seems no necessity for it.

REVIEWS.

A MANUAL OF PRACTICE OF THE HIGH COURT OF JUSTICE FOR ONTARIO, under the Judicature Act, 1881, with the additional rules of the Supreme Court of Judicature for Ontario, passed since the 21st of August, 1881, and the Rules of the High Court of Justice; by George Smith Holmsted, Registrar of the Chancery Division. Toronto: Rowsell and Hutchison, 1881.

We are happy to say that the anticipations expressed in the last issue of this journal, with regard to the above work, have been abundantly fulfilled by a perusal of it. The author concisely and modestly states the object of his Manual in his preface in the following words: "To those who have neither the time, nor inclination, to make an analytical study of the Act and Rules, with a view to informing themselves of their precise bearing upon the different stages of an action, it is thought the following pages (in spite of whatever defects may be found therein), may be some service, as the author has endeavoured to focus the several portions of the Act and Rules applicable to each particular step of the proceedings, and thereby save the practitioner the labour of an independent search, at each time he wishes to take a step in a cause."

The fact is, however, the Manual supplies a clearly needed help to the mastery of the new procedure, which no mere study of the Acts and Rules would render unnecessary, and which could not be afforded by the excellent works of Mr. Maclennan and Messrs. Taylor & Ewart These latter are, in fact, manifestly framed upon a different plan, and intended to supply other requirements. To write a Manual which can be, without effort, read through consecutively so as to give a general bird's-eye view of the whole field of the practice of the High Court, is no light undertaking, and we can honestly say Mr. Holmsted has succeeded in it; at the same time his book is sufficiently full in its matter, and in its citations of Rules and cases, to make it of great use for reference on any particular point that may arise in practice.

This book has more similarity to Indermaur's Manual of Practice than to any work we know of, and this, indeed, seems to some extent to have suggested its arrangement. It first deals with

the ordinary steps in a cause from its commencement to execution, and then takes up the various incidental proceedings in actions, *e. g.*, Disclosure of Parties, Security for Costs, Discovery and Production of Documents, Amendments, etc. Anxious as a critic naturally is to criticise, it is hard to find anything in the arrangement to submit to this invidious process, unless it be the very small point that the matter relating to "Allowance of Service of Writ, when served out of the Jurisdiction," is placed under the heading "Proceedings in Default of Appearance," instead of under that of Service of Writ of Summons.

Some the features of the book which Mr. Holmsted has evidently taken pains to note are—(1) the points in which the old and new practice differ; (2) the points in which the English practice under the Judicature Acts differs from our own; (3) the points on which, owing to the Judicature Act having made no provision, the old practice may be held to continue; (4) the points in which our rules at present are ambiguous or defective; (5) which the forms appended to our Act cause embarrassment by their imperfect accordance with the rules to which they are intended to conform. When we add that Mr. Holmsted has not hesitated to give the reader the benefit of his research and experience to suggest solutions of the difficulties which present themselves, we feel that it is unnecessary to say any more in commendation of his book.

It was our original intention to cite some examples of what we have here stated, and to lay before our readers some of Mr. Holmsted's criticisms and suggestions. It would, however, take up space to little purpose, as we are confident the Manual will be widely, if not universally studied by the profession. One pregnant suggestion, however, to which we would call attention, arises out of the consideration of section 12 of the Act, which provides that, in default of special provision, the practice and procedure is to be the same as that which would have been in use in "*the respective existing Courts*, if the Act had not been passed." This section is taken from section 22 of Imp. Act of 1873, and is natural enough in England, since there the Chancery Division still retains exclusive jurisdiction over the various classes of actions, which, under the previous practice, were more particularly within the category of Chancery causes. But our Act abolishes all distinction, and gives to each Court the jurisdiction formerly possessed by all the others. Mr. Holmsted observes, with apparent justice, that it is to be regretted now that the several Divisions of the High Court have co-ordinate jurisdiction in all actions, that some way could not have been found of completely assimilating the practice in all the Divisions, and suggests that this might have been done by providing that in matters of practice not specially provided for, the practice of the former Courts of Law should prevail, and where there was no practice on the point in the Courts of Law, the former practice in Chancery should be the law, or *vice versa*.

Mr. Holmsted has not overburdened his Manual by citing cases, but seems to have taken much trouble to choose those most necessary to be remembered. We should expressly pick out as useful the remarks on pp. 28-29, as to what property is "separate estate," so as to entitle a married woman plaintiff to sue in respect of it without a next friend; and those on pp. 155-1588 in which he tabulates in a convenient form the cases which show what debts are attachable, and what debts are not attachable. This is not to be found in either of the annotated editions of the Act, Messrs. Taylor and Ewart merely mentioning some of the cases, but not setting out their results in the convenient method adopted by Mr. Holmsted. As to the separate property of married women, Mr. Holmsted points out that, since the decision in *Furness* v. *Mitchell*, 3 App. R. 510, and the Declaratory Act, 40 Vict. c. 7. sched. A. (R. S. O. c. 125, sec. 4, ad ex.), the authority of *Boustead* v. *Whitmore*, 22 Gr. 222, for the proposition that the *jus disponendi* is conferred by R. S. O. c. 125, sec. 4, cannot but be considered as very seriously shaken; and he arrives at the conclusion that it is only property *expressly settled* to her separate use, which comes within R. S. O. c. 125, sec. 7, relating to the wages and personal earnings of a married woman, and any acquisitions therefrom, etc., which is the "separate estate" of a married woman, so as to entitle her to sue without a next friend.

In conclusion, we can cordially recommend

the Manual to our readers as a useful, well-written work.

A MANUAL OF THE PRACTICE OF THE SUPREME COURT OF JUDICATURE IN THE QUEEN'S BENCH AND CHANCERY DIVISIONS. Second Edition, by John Indermaur, Solicitor. London: Stevens & Haynes, London, 1881.

The books written and edited by Mr. Indermaur, "The Student's Friend," are legion. The one before us like the others is "intended chiefly for the use of Students." The subject is one that is now of interest to our legal juveniles as well as those in England; and the manual before us gives a comprehensive sketch of the system of practice now common to both countries. Of course in this country we have books appropriate to our procedure which will with the current decision give the student all the reading he is likely to find time for in this branch of his studies; but a reference to Mr. Indermaur's manual will often set him on the right track or solve a difficulty arising from a want of knowledge of some elementary principle not alluded to in books intended solely for practitioners.

A COMPENDIUM OF THE LAW RELATING TO EXECUTORS AND ADMINISTRATORS, by W. Gregory Walker, B.A. London: Stevens & Haynes, Law Publishers, Bell Yard, London, 1880.

The idea of this book is well conceived and well carried out. It is exactly what its name indicates. As the author remarks, the learned volumes of the late Mr. Justice Williams almost exhaust the subject, and will long remain the authoritative exposition of this branch of the law. They are, however, very expensive, and their very bulk makes them useless for many of the purposes for which this compendium supplies. Mr. Walker, in the work before us, has confined himself to the integral parts of the main subject, omitting those incidental to it; confining himself to matters practical, and leaving out those of antiquarian or historical interest. The practice connected with this branch of the law is barely touched upon, nor would it have been appropriate in a book of this nature to have enlarged upon a matter which must be more fully and accurately discussed in works devoted to it.

The task which Mr. Walker set for himself to do has, we think, been well and faithfully done, evincing a thorough knowledge of the subject, and evincing a mind capable of grasping the salient points of this much adjudicated branch of law. We strongly recommend Mr. Walker's book to the profession in this country. It supplies a felt want, and will doubtless command a ready sale. Like all the works published by the leading house of Stevens & Haynes, the one before us is a master-piece of typographical art.

FLOTSAM AND JETSAM.

AN Illinois citizen brought his daughter's young man before a justice for violently ejecting him from his own parlour one Sunday evening. After hearing the other side, the justice said: "It appears that this young fellow was courting the plaintiff's gal, in plaintiff's parlour; that plaintiff intruded, and was put out by defendant. Courting is a public necessity, and must not be interrupted. Therefore, the law of Illinois will hold that a parent has no legal right in a room where courting is afoot. Defendant is discharged, and plaintiff must pay costs."—*Virginia Law Journal.*

ENGLISH JUDGES.—Recent deaths of judges suggest some reflections upon the thorough change which, a few years have produced upon the bench. Within twelve years every judge on the common-law side has died, retired, or been promoted. To take the Queen's Bench, Lord Chief Justice Cockburn and Justices Shee and Quain have died; Justice Blackburn has become Lord Blackburn, Justice Lush has become a lord justice. Sir John Mellor has retired, and Sir James Hannen has gone to the Divorce Court; in the Exchequer, the Chief Baron, Barons Channell, Piggot, and Cleasby, have died; Baron Bramwell has become a lord justice; in the Common Pleas, Chief Justice Erle retired, and Chief Justice Bovill died, and Justices Willes, Keating, Honyman, and Archibald died; Justice Brett has become a lord justice, Justice Byles has retired, and Justice Montague Smith has been promoted to the Privy Council.

On the equity side, death and retirement have produced the like effect. Lord Chelmsford, Lord Chancellor, Lords Justices Turner, Knight-Bruce, Rolt, Giffard, James, and Thesiger died; Lord Romilly died; Vice Chancellors Stuart, Kindersley, and Malin retired; and Vice Chancellor Wickens died. *Law Times.*

Canada Law Journal.

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DIARY FOR NOVEMBER.

16. Wed..Wilson, J. Q. B., & Gwynne, J. C. P. 1868. Final
17. Thur..Final Examination for Call. [Exam. for Attorney.
18. Fri..Hagarty, C. J., sworn in C. J. of Q. B. Wilson, J. [sworn in C. J. of C. P. 1878. Final Exam.
19. Sat..
20. Sun..*23rd Sunday after Trinity.*
21. Mon..Michaelmas Term begins.
25. Fri..Lord Lorne, Governor-General of Canada, 1878.
27. Sun..*Advent Sunday.* Cameron, M. C., sworn in Q. B.
28. Mon. [1878.
30. Wed..Moss, J. appointed C. J. of Appeal, 1877.

TORONTO, NOV. 15, 1881.

THE *Central Law Journal* has with commendable candour "taken back" some thoughtless remarks anent the prosecution of the wretched Guitteau, in which his guilt and the invalidity of his intended defence were taken for granted. Thanks partly to the views expressed by the leading legal periodicals in the United States, and partly to the fact that the country has had time to think the matter quietly over, there is every reason to believe the prisoner will have a fair trial. The way in which the bar, at least at first, refused to undertake his defence was far from creditable. In this also, should there be any necessity, a better feeling would now prevail.

IT may be remembered that in the review of the Dominion Acts of last session, contained in our number for Oct. 15th, we called special attention to the fact that chap. 13 forms an exception to what Mr. Alpheus Todd states in his Parliamentary Government in the British colonies as to none of the Dominion Naturalization Acts containing provisions bearing on the "property and civil rights of aliens;" it having been hitherto considered that this falls within the exclusive powers of the provincial legislatures under sec. 92 of the B. N. A. Act, although sec. 91 empowers the Dominion Parliament exclusively to legislate upon "naturalization and aliens." We publish in this number a communication which Mr. Todd has been kind enough to send us, commenting upon our observations with reference to the above subject.

A CORRESPONDENT, whose letter appears in another place, takes exception to the ruling of a County Judge who holds that the practice at Common Law should prevail rather than that in Chancery as to the examination of parties in County Court cases. We think the Judge was right. Sec. 17, sub-sec. 10 does not, it seems to us, apply to the case in point. The section is an enactment amending and declaring the law hereafter to be administered on certain matters therein set forth; the 10th sub-sec., therefore, refers to rules of law rather than to rules of practice. It may not always be easy to draw the line between "law" and "practice," but it seems sufficiently clear at least as to the subject under discussion that the section does not apply. There is no Common Law right to examine parties; the authority comes by statute, and the statute in point declares at what stage of the proceedings the examination may be had. This provision is made applicable to County Court cases, and without it there could be no examination at all.

De minimis non curat lex is a maxim which may possibly even yet have some meaning, but there are two points in connection with Osgoode Hall which, although some may

consider them small, are well worth the attention of the powers that be. In the first place we would suggest that some official about the building should receive instructions to throw open all the windows in the library, law courts and passages in the building, every evening. The atmosphere would then be fresh and sweet by morning, and would scarcely have time to become so positively foul as it often does become at an early period in the day. In the second place, it is surely time that the Library Committee, or whoever the proper authorities are, should cease to labour under the suspicion of conspiring deliberately to destroy the eyesight of those members of the profession who have occasion to read or write in the library after 3.30 p.m., at this time of year. A long tube with a circle of gas jets coming down from the ceiling over the centre of each table—or a moderator lamp placed on each table, as soon as it commences to get dark, would remove what at present is a really serious grievance.

WE have received a fresh batch of our far-away contemporary, the *Australian Law Times*. From it we learn, amongst other things, that a bill has been introduced by a member of the Legislature at Melbourne, having in view the amalgamation of the two branches of the legal profession. Conveyancing in that happy country appears to be, as it ought to be, entirely in the hands of the legal profession. An application was made to Mr. Justice Higinbotham in Chambers, on behalf of the Law Institute of Victoria, for an attachment against two persons composing a firm of Land and Estate Agents for contempt of Court in preparing a deed relating to land, "they not being barristers, attorneys, solicitors or conveyancers." The defence was that although the agents had prepared the deed, they had subsequently paid a solicitor for revising it. His Lordship, however, declined to accept the excuse, and issued the attachment, which, however, was subsequently rescinded, the full Court not considering the evidence sufficient. The judges, at the same time, expressed their opinion that the circumstances were suspicious, and urged the impropriety of allowing any tampering with the safeguards provided for the public by the Conveyancing Act.

Will such a legal millennium ever arrive in this part of that Empire on which the sun never sets? Our circumstances are almost identical, but here, after, as it were, buying a profession, the law allows us to be robbed of our purchase by every impudent quack that has mastered the three great R's.

As to the nature of a defence in criminal cases, on the ground of insanity, since the murder of Mr. Garfield, volumes have been written. A recent article in the *International Review* has some sensible observations on the subject. We make an extract:—

"An individual may be medically insane and yet not a lunatic in a legal sense. His brain is diseased, either temporarily or permanently his mind is not in all respects normal in its action, and yet he is responsible for his acts. . . . While a knowledge of right and wrong can never be properly regarded as a test of insanity, it is a test of responsibility; and by knowledge of right and wrong is not meant the moral knowledge that a particular act would be intrinsically right or wrong—in other words, a sin—but that it would be contrary to law. In reality, however, the individual may not even have this knowledge; but he must have, in order to make him responsible, the mental capacity to have it. For ignorance is no excuse, and the safety of society imperatively requires that all should take means to make themselves acquainted with the laws of the land in which they live. Now, any individual having the mental capacity to know that an act which he contemplates is contrary to law, should be deemed legally responsible, and should suffer punishment. He possesses what Bain calls 'punishability.' If he does not possess this

capacity, then he ought not to be allowed to go at large; for he is a greater enemy to society than one who, with evil intent, has nevertheless sufficient reason to guide him. . . . . The question, therefore, in the case of a criminal, should not be, 'Is he insane?' but, 'Is he responsible?" When this change is effected, we shall hear very little about disagreement between medical experts and jurists relating to who should, and who should not be punished. And again no degree of insanity should absolve a criminal from the minimum amount of punishment that may be necessary to protect society against him and others like him. When there is less morbid sentimentality relative to the rights of certain kinds of lunatics, who are no better than wild beasts, we shall have fewer outrages to record, and few monsters in human form to perpetrate them."

The session of the Social Science Congress, which opened on Oct. 3rd ult., at the Exhibition Hall, Dublin, does not seem to have furnished much of special interest. The address of Lord O'Hagan, the President, related chiefly to the recent beneficial changes in the law of practice and procedure in Ireland. With reference to the recent abuses of the jury system in that country, he justly observes that it would be very unreasonable to form an adverse judgment as to the permanent action of a just principle, because, from a passing disturbance of the general mind, its application may have produced a temporary mischief. The section of jurisprudence and amendment of the law was opened by Dr. Ball, ex-Lord Chancellor of Ireland. He first mentioned the subjects set for discussion, which were :—

"1. Is it desirable that there should be periodical meetings of representatives of various States, to which all disputed international questions should be referred? 2. Should the procedure on private bill legislation in reference to local improvements be amended so as to facilitate inquiries on the spot by Parliamentary committees or otherwise? 3. Are any, and what, alterations in the jury laws desirable?"

The first he answered in the affirmative, citing a passage in support of his view from the celebrated treatise of Grotius, which first reduced the law of nations to a system. With regard to the second he expressed an opinion that, when the matter is minutely examined, there will be found a range of subjects, of lesser magnitude, over which central control is not so much needed, and as to which Parliament might safely delegate jurisdiction. On the third subject, which seems to be exciting so much discussion in many quarters, and on which Mr. Justice Cameron made some interesting and impressive remarks in his recent charge to the Grand Jury at the opening of the York Criminal Assizes, Lord O'Hagan spoke as follows :—

"The questions which arise in connection with the jury system as existing in England and Ireland seem to be principally in reference to the qualification of jurors, and the obligation of unanimity in order to a verdict. How far beyond the effect of a fixed qualification in limiting the number and securing the requisite fitness for discharge of their duty selection may be applied, and whether in criminal cases there should not be some mode of correcting erroneous conclusions of the jury, as in civil there is, from the power vested in the Court of directing new trials, are also matters respecting which difference of opinion prevails among jurists. With respect to unanimity, there can be no question that it enforces careful examination and sifting of the evidence, and tends to give weight to the decision, and to produce acquiescence in it. If disagreement is revealed, the defeated party may be expected to cite the favourable suffrages of the minority, and to insist that their authority is equal to that of the majority; while the external public will most probably regard the whole proceeding as infected with doubt and uncertainty. In criminal cases, the disclosure of the disagreement would place the members favourable to conviction in an invidious position; and this would particularly apply to trials of political offences. It would also embarrass the judge when awarding punishment, and the Executive Government afterwards in resisting applications for its remission. These considerations seem decisive,

if not in favour of absolute unanimity, certainly of requiring a considerable preponderance, in order to authorize a verdict to be received, so that the decision would have to encounter the dissent of merely a trifling minority. Forces entirely out of present calculation may disturb the social system. They may even be of such a character that the community has no resource except in a temporary suspension of privileges which, abused in their exercises, cannot otherwise ultimately be preserved."

This address was followed by a paper by Mr. Joseph Brown, Q.C., also on the subject of proposed alterations in the jury laws. He advocated majority verdicts, and the raising of the rating qualifications so as to exclude the less educated classes. With regards to the former he stated a fact of which we were not aware, 'that *most of the British Colonies* have reduced the number of a jury and adopted the verdict of a fixed majority, and have found the change satisfactory after many years' trial.

LEGAL PROCEDURE IN ENGLAND.

The report of the Committee on Legal Procedure, appointed by the Lord Chancellor of England in January, has now been published, and will be found in the Weekly Notes for October 15th. The Committee represented all branches of the profession, its members being Lord Chief-Justice Coleridge, the late Lord Justice James, Sir James Hannen, Mr. Justice Bowen, Lord Shand, the Attorney-General, the Solicitor-General, Mr. (now Mr. Justice) J. C. Matthew, Mr. R. T. Reid, Mr. John Hollams, and Mr. Charles Harrison. At this time, when the fervour for the reform of legal procedure is strong in the land, the Report will be read with great interest. It is carefully reviewed by our excellent contemporary the *Irish Law Times*, in its issue for October 15th. The article is too long to reproduce in full, but we shall make free use of it.

In the first place, then, the Committee have decided, after an examination of the Judicial statistics for 1879, that the writ of summons in its present form is effective in bringing defendants to a settlement at a small cost, and that it is inadvisable to make any alteration by uniting with it a plaint or other statement of the plaintiff's cause of action, which would add to the cost of the first step in the litigation.

The Committee had next to consider how far it was possible, in those cases in which litigation was continued after the appearance of the defendant, to adopt a procedure (1) for ascertaining the cases in which there is a real controversy between the parties; (2) for diminishing the cost of litigation in cases which are fought out to judgment. They arrived at the opinion that, as a general rule, the questions in controversy between litigants may be ascertained without pleadings. And accordingly it was resolved that the defendant shall, within, say 10 days after appearance, give notice of any special defences —such as fraud, the Statute of Limitations, payment, &c.; after which the plaintiff shall give notice of any special matter by way of reply on which he intends to rely; and that no pleadings shall be allowed unless by order of a Judge.

The effect of the rest of the Report is thus given by the *Irish Law Times:*

"Their next recommendation is that every action shall be assigned to a particular Master's list; and that at any time after the writ, appearance, and time for notice of defence, a summons for directions may be taken out by either party before the Master to whom the cause is assigned for directions as to any one or more of the following matters :—Further particulars of writ, further particulars of defence or reply, statement of special case, venue, discovery (including interrogatories), commissions, and examination of witnesses, mode of trial (including trial on motion for judgment and reference of cause), and any other matter or proceeding in the action previous to trial. They, furthermore, distinctly approve of the happy-despatch style of procedure by 'omnibus' summonses,

for the existing practice of requiring a separate summons for each separate matter is to be discontinued; and upon any summons by either party, it shall be competent for the Judge or Master to make any order which may seem just at the instance of the other party. And any application which might have been made upon the summons for directions shall, if granted upon any subsequent application, be granted at the costs of the party so subsequently applying, unless the Master or Judge otherwise direct. Their next resolution is that discovery and interrogatories shall be limited to such discovery of documents or facts relating to any part of the matter in dispute as the Master shall order. The costs, unless otherwise ordered, shall be borne in the first instance by the party asking for discovery or interrogatories, and shall be allowed as part of his costs of suit, where, and where only such discovery or interrogatories shall appear to have been reasonably and usefully asked for. And with a view to diminishing the number of interlocutory appeals in matters of procedure, they resolve that the appeal from a Master shall be to a Judge in Chambers; and the appeal from a decision of a Judge at Chambers shall be to the Court in *Banc*, such appeal only to take place in cases of special difficulty and importance, when allowed by the Judge giving the decision, or with special leave of such Court. All motions by way of appeal from inferior Courts, applications to set aside awards, for attachments, *mandamus*, *quo warranto*, *scire facias*, to answer the matters of affidavits, to strike solicitors of the rolls, and for criminal informations are to be disposed of on notice of motion without any rule *nisi*.

"In the next place, they make the important recommendation that the mode of trial shall be by a Judge without a jury, but, on the summons for directions, on the application of either party, an order shall be made that the cause be tried by a jury, if it shall appear that the questions involved can conveniently be so tried; provided always that in the following cases the right of either party to a trial by jury shall be absolute—libel, slander, seduction, false imprisonment, malicious prosecution, breach of promise of marriage. And again, if it be made to appear to the Judge, at or after the trial of any case, that one of the parties was, a reasonable time before the trial, required in writing to admit any specific fact, and without reasonable cause refused to do so, the Judge should either disallow to such party, or order him to pay (as the case may be) the costs incurred in consequence of such refusal. * * And as to new trials it is resolved that, after the trial of any cause before a Judge and jury, the Judge may, upon application, certify that he is dissatisfied with the verdict, in which case a new trial shall take place unless the Court shall otherwise order. Neither party shall have a right to a new trial on the ground that some question has not been left to the jury which the Judge at the trial has not been asked to leave to the jury. The Court shall have power in such cases either to direct a new trial, or, with the view of saving a further trial, to draw all inferences of fact, or take further evidence, or direct inquiry. All applications for a new trial shall be by notice of motion, stating the grounds of application to the Court. Such applications shall be disposed of on the motion, without any rule *nisi*. And as to appeals the Committee resolve that all such from a Judge without a jury shall be to the Court of Appeal; and also where a Judge has directed a verdict for plaintiff or defendant; and the Court of Appeal shall thereupon have the power to dispose of the whole case. All applictions for a new trial in jury causes shall go to a Court in *Banc*, consisting of three Judges (of whom the Judge who tried the case shall not be one); the decision of this Court shall be final, except with their leave, or in case of difference of opinion, or where the subject matter of appeal exceeds £500. All appeals from the Court in *Banc* shall be to a Court of Appeal of not less than five Judges. And where a compulsory arbitration has been ordered, an appeal from the decision of the arbitrator shall be allowed on a question of law to the Court in *Banc*, whose decision shall be final except with their leave, or in case of difference of opinion, or where the subject matter of appeal exceeds £500.

"With respect to costs, the Committee recommend that there shall be a uniform scale and system in contentious business in all the divisions of the High Court."

Finally we may note that the Committee specially recommend that there shall be, as far as practicable, a uniform system of procedure in all the divisions, so that there shall be no inducement to bring actions, not

specially assigned, in one division rather than in another. In our review of Mr. Holmested's Manual of Practice in our last issue, we called attention to a similar suggestion made by him. The learned writer will be glad to see his views borne out by such high authorities.

RECENT DECISIONS.

The first case in the October number of the English Law Reports, Chancery Division, Vol. 17, p. 721-844 is *Nobel's Explosive Co.* v. *Jones, Scott and Co.*, which raises two somewhat novel and somewhat difficult questions in relation to the law of patents. These two questions are as follows: (1) Is the importation into England of a material manufactured abroad by a process patented in England, although for the purpose only of transhipment for exportation, and not for the purpose of having the material landed and stored in England, to be considered a continuing user in England of the invention, and hence an infringement? (2) Where the alleged infringers have acted merely as agents (*e.g.* as Custom House agents for an importing firm), and without having any personal interest, can they be held to have incurred any liability in respect to the infringement? The first question Bacon, V. C., decided in the affirmative on the authority of *Betts* v. *Neilson*. L. R. 3 Ch. 429, and because, having regard to the nature of the invention, and that its most essential quality was that it acquired for nitro-glycerine "the property of being in a high degree insensible to shocks," it appeared to him impossible to tranship or in any manner to handle or move the commodity made according to the invention without at the same time using the invention. It may be observed that the nature of the patented article in *Betts* v. *Neilson* was somewhat similar to the nature of the patented article in this case, and possibly the law in such cases may turn upon the nature of the patented article in each particular case: (see as to this *per* Baggallay, L. J. p. 744).

The second question Bacon, V. C., also decided in the affirmative. The learned V. C. grounded his views upon the law as laid down by Wood, V. C., in *Betts* v. *DeVitre*, 11 Jur. N. S. 9, 11, where he says: "This Court has always been in the habit of holding that anybody who takes part in a wrong of this description, is liable to be restrained from committing the wrong, and is answerable.' The Court of Appeal, however, overruled his decision as to this. James, L. J., says (p. 741): "Can anybody say that going to the Custom House and writing to the Custom House for Krebs & Co., (the importing firm) for a "warrant to discharge things from a ship into a barge is making the invention? Is it using it—is it exercising or vending it? . . . . A man who has no possession of the thing, and has no control over it, and who has no dominion or power to deal with it, to whom the safety or the want of safety is not of the slightest consequence, cannot be said to be using the invention; and that is the only way in which it could be said that these letters patent were infringed. . . . . The Court of Chancery has always held a hand over agents, but then it appears to me they must be actually agents. They must be agents who are agents in the making, in the using, in the exercising, or in the vending of the invention. They must be actually agents whose agency is directly in the making, using, exercising, or vending." Baggallay, L. J. and Lush, L. J. concurred.

In *Re Gosman*, p. 771, Jessel, M. R. held that the Crown could not be charged with interest on the rents and profits received from the property of an intestate, while that property was in its possession, pending the establishment of their claim by the next of kin. "Interest," said he, "is only payable by statute or by contract."

A few pages on there come a succession of will cases. The first of these is *In re*

Lucas's will (p. 788), which forms a fresh illustration of what Malins, V. C., declares to be a rule of the Court, viz., that where there is a gift to a class of persons, with substitution to their issues in case of their dying—that means whether they are dead when the will is made, or die afterwards—the substituted class take in each case. *In re Potter's Trust*, L. R. 8 Eq. 52, was another case illustrating the same rule; and the present case decides that whether the testator did, or did not know that one of the class of persons was dead at the time the will was made, is immaterial. The next case, *Bland* v. *Dawes*, p. 794, decides that a legacy given to a married woman for her "sole use and disposal" vests in her as separate estate; thus agreeing with the decision in *Prichard* v. *Ames*, T & R. 222, where the words were "for her own use, and at her own disposal," and from these cases may be distinguished those in which the word "sole" is used alone, for the authorities (see per Malins, V. C. p. 797), show that this is not sufficient to confer separate estate.

The next case, *In re Hardy* (p. 798), is also a will case, involving two points (1) the testator having given to his wife "the legacy or sum of £500, which I demand to be paid to her *immediately* after my decease," it was held that this legacy to the wife had priority over all the other pecuniary legacies bequeathed in the will; and *Blower* v. *Morret*, 2 Ves. Sen. 420 was dissented from. "Where a man leaves money to be paid to his wife immediately," says the V. C., "she is not bound to wait until the executors can ascertain the state of the assets." (2) The testator having directed sums of £12,000 and £5,000 to be raised out of his estate, and invested in the securities therein mentioned, and the interest of the £12,000 to be paid to his wife during her life, and the interest of the £5,000 to be paid to his brother and sisters during their lives, and after the death of his wife, brother, and sisters, these sums to fall into the residue of the estate, and having then proceeded to give his brothers and sisters legacies of £6000 and £2000, and other small legacies, it was held the legacies of £12,000 and £5000 had priority over the other legacies. Malins, V. C., in his judgment calls this second point one "of extreme nicety and doubt," but decided it in the above way on the ground that there was sufficient in the general frame of the will to reasonably satisfy his mind that the testator had intended to make and had made such a marked distinction between the legacies in which life interests only were given, and those in which the *corpus* was absolutely given, that the effect of the will was to give priority to the £12,000 and the £5000; and the two marks of this to which he specially alludes are (1) that the testator directed that on the £12,000 and on part of the £5000 interest should be paid to the respective beneficiaries *from the time of his decease;* and (2) that the testator directed the above sums *to be invested in a particular manner.*

The next case of *Havelock* v. *Havelock* at p. 807 requires some notice here, as being in the opinion of the V. C. "in its particular circumstances entirely novel." A testator left property to the value of £10,000 a year, to be *accumulated* for twenty-one years, and then held in trust for Sir H. Havelock, for life, with remainders over to his children in tail; and as Sir H. Havelock was possessed of a moderate income only, which was insufficient for the maintenance and education of his sons, to fit them for their prospective positions in life, Malin's, V.C., ordered that a sum of £2700 per annum should be allowed him for the benefit of the infants. He held the case to be in principle similar to that of *Bennett* v. *Wyndham*, 23 Beav. 521, 4 D. F. and J. 259, and referred to other cases as in substance authorities for the present decision. "It appears," said the V. C., p. 813, "that the testator was under the impression that Sir H. H. had a considerable fortune. I have no doubt of it, for it is the only way

you can account for his making his will in the terms he did, therefore I believe it would have been the intention of the testator, if his attention was called to the fact and he knew the true state of the facts, to have done what I am asked to do."

In re Pringle, p. 819, is another will case. A testatrix, by her will, after giving a pecuniary legacy and bequeathing furniture, leaseholds, and dock shares, gave "all the rest of her money, however invested," to her nephew, R. J. F. "under deduction of £50 to be paid to each of her executors." She then gave a number of specified articles, such as ornaments, plate, pictures, and house linen, to various other nephews and nieces, and appointed executors; and it was held by Hall, V. C., that the gift to R. J. F. was a general residuary gift, and included the furniture, leaseholds, and dock shares, the bequest of which had lapsed. The V. C. remarks, p. 823, that there is a difference in the judgments in *Lowe* v. *Thomas*, 5 D. M. & G., 315, before the Court of Appeal, and in *Stooke* v. *Stooke*, 35 Beav. 396 before the M. R. as to whether the fact of a specific gift coming after the gift to be continued must be held to show that the preceding gift could not have been meant to be residuary. He held there was sufficient in this will to enable him to hold that the above circumstance did not prevent he gift in question being residuary, for the gift of £50 was clearly demonstrative, and this being associated with or charged upon the gift of "all my moneys" appeared to show that the testatrix was there dealing "not merely with specific property, but also with that which affected and operated upon, or might operate upon, the general estate."

In the case of *Steel* v. *Dixon*, Fry, J., decided, upon principle, that a surety who has obtained from the principle debtor a counter-security for the liability which he has undertaken, is bound to bring into hotchpot, for the benefit of his co-sureties, whatever he receives from that source, even though he consented to be a surety only upon the terms of having the security, and the co-sureties were, when they entered into the contract of suretyship, ignorant of his agreement for security. He remarks, p. 831, that in coming to this conclusion he is much strengthened by American authorities to which he refers.

Lastly, *Partridge* v. *Baylis*, p. 835, is also a will case, in which a question arose as to the period of vesting of certain legacies. The decision, however, turned entirely upon the terms of the particular will, and the case does not call for any special notice here. This completes our reviews of the October number of the Law Reports, Chancery Division.

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH.

Osler, J.] [Nov. 1.

JONES v. CANADA CENTRAL RAILWAY CO.

Railway debentures — B. N. A. Act — Ultra vires.

The plaintiff being holder of a debenture by the B. & O. R. Co., pursuant to 23 Vict. c. 109, put it in suit.

This company, by 27 Vict. c. 57, was empowered to issue preferential bonds and secure payments by a mortgage to a trustee. 31 Vict. c. 44 (O), reciting the possession of the trustee and his being about to foreclose, directed the debentures to be changed into stock at so much in the dollar, and that holders should only claim on the company for conversion of the debentures into stock. An amalgamation took place under 41 Vict. c. 36 (C) between the B. & O. Co. and defendants, the latter holding that their liability on the debentures was cancelled by 31 Vict. c. 44 (O), and they were ready to accept the debentures in lieu of reduced stock. The third replication set up that the

Act was not binding, being a private Act, and plaintiff was not named in it, nor was he a petitioner, nor was he specially deprived of his rights thereby. Fourth replication—Act *ultra vires*, the debenture being payable in England, and was domiciliated there, and the holder resided there when Act passed.

Held, that the third replication was bad, for the Act included plaintiff, by referring to the class of holders to which he belonged.

Held, also, that the fourth replication was bad, as the Legislature was not confined by the words "property and civil rights in the Province," to legislation respecting bonds therein.

Watson, for demurrer.

MacKenzie, contra.

Osler, J.] [Nov. 5.

REGINA v. PALMER.

Liquor License Act—Extent of licensed premises.

Defendant had a license to vend liquor "in and upon the premises known as the Palmer House," which was situated on the fore portion of a lot belonging to defendant. The rear part of the lot was for several years enclosed and used as a fair ground, and within this defendant sold liquor and was convicted for so doing: *Held*, that the fair ground was not included in the license, and the conviction was upheld.

Fenton, for the Crown.

Murphy, contra.

[This case is similar in its general facts to *Reg.* v. *Fraser*, ante. p. 346 on which the appellant relied, but was successfully distinguished on some points.—EDS. C. L. J.]

CHANCERY.

Ferguson, J.] [Nov. 14.

WOLFFE v. HUGHES.

Practice—Setting aside judgment.

When a cause was called on for hearing, neither the defendant, nor any one on his behalf, appeared, by reason of which a judgment was pronounced in favour of the plaintiff. Subsequently the defendant applied for an order to set aside the judgment. The Court [FERGUSON, J.,] being satisfied that the absence of the defendant and his counsel was purely accidental, granted the order asked on payment of the full costs of the hearing including all reasonable disbursements to counsel, &c., together with the costs of the application. If this indulgence not accepted, subject to the terms proposed, the application to be refused with costs.

Spragge, C. J. O.] [Oct. 17.

MCARTHUR v. GILLIES.

Riparian owners—Water's edge—Boundaries—Obstructions to flow of water.

Although the rule is that the description of land situate on a stream, not navigable, the course of which goes to the water's edge or to the bank, carries the grant or conveyance to the thread of the stream and that the description continuing along the water's edge or bank will extend along the middle or thread of the stream, unless qualified by the context, still the grantee has no right by reason of such conveyance to erect any structure in the stream that may or can affect prejudicially the flow of the water, as regards the rights of other riparian owners.

Spragge, C. J. O.] [Oct. 17.

ARTLEY v. CURRY.

Boundaries—Original monuments—Surveys.

In questions relating to boundaries and descriptions of lands, the well-established rule is that the work on the ground governs, and it is only where the site of a monument on the ground is difficult of ascertainment that a sur-

veyor is authorized to apportion the quantities lying between two defined or known boundaries. Therefore, where the original monument or post planted as indicating that the north-west angle of a lot was situated at a distance of half a chain south therefrom, and another surveyor had actually planted a post at the spot so indicated, and subsequently two surveyors, in total disregard of the two posts so planted, both of which were easy of ascertainment, made a survey of the locality and placed the posts at a different spot, the Court [SPRAGGE, C. J. O.] disregarded the survey, and declared the north-west angle of the lot to be as indicated by the first mentioned monuments.

[These cases were heard before the Chief Justice of Ontario when Chancellor.]

Boyd, C.] [Oct. 26.

BURROWS v. DEAVENS.

Conveyance by illiterate person—Misrepresentations to party executing a deed—Husband and wife.

A married woman, who could neither read nor write, and was possessed of real estate, was asked to join in a conveyance by way of mortgage in order to bar her dower in her husband's land, and it was not explained to the husband that, by his wife joining, her estate would be liable in any way. In fact the husband and wife were made joint grantors, and jointly covenanted for payment. After the death of the husband proceedings were instituted against his widow to compel payment. The Court [BOYD, C.] under the circumstances declared the instrument invalid as against the separate estate of the widow and dismissed the bill with costs.

CHAMBERS.

Osler, J.] [Oct. 5.

GLASS v. GLASS.

Ejectment — Dower — Counterclaim — Decree form of.

In an action of ejectment the defendant may set up a counterclaim for dower out of the lands in question.

Form of decree for such a case provided.

Holman, for plaintiff.

Van Norman, Q. C., contra.

Osler, J.] [Oct. 5.

MERCHANTS BANK v. CAMPBELL.

Execution against lands—Sale—Sheriff's fee—Poundage.

A sheriff has no right to poundage upon an execution against lands unless there has been an actual sale.

Osler, J.] [Oct. 14.

ROBERTSON v. CAULTON.

Arrest—Capias — Action — Amendment, affidavits, entitling of—Writ, form and amendment of.

Defendant was arrested under a writ of *capias* issued after action and before judgment and put in bail to the sheriff. He applied to have his arrest set aside on the grounds :

1. That the affidavit on which the order for arrest was obtained did not sufficiently state the cause of action.

2. That the affidavit was not properly entitled.

3. That the affidavit did not show sufficient cause for believing that he was about to leave the country with intent to defraud his creditors.

4. That the form of the writ of *capias* issued (*ca.re.* before action) was not the proper form of writ to be issued under the said order.

1. *Held*, that the writ of summons having been specially endorsed with the claim sufficiently described, the plaintiff should have leave to file an affidavit *nunc pro tunc* proving his cause of action.

2. *Held*, that the affidavit on which the order to arrest was obtained might be amended by adding the style of cause and division to which the action was assigned.

3. *Held*, that the fact of defendant's intention to leave the country, without a fraudulent intent being shown, was enough to justify his arrest, the debt not being denied.

4. *Held*, that the writ of *capias* and copy might be amended so as to make it the form of a writ of *capias* after action.

Held, also that a *capias* is now a proceeding in a suit, and that the action must be commenced by writ of summons.

H. J. Scott, for defendant.

Perdue, for plaintiff.

Proudfoot, J.] [Oct. 18.

BARKER V. FURZE.

Notice of trial—Chancery Division—Special Sittings—Entry of Action—Rule 266.

Thirteen days' notice of trial was give for a special sitting appointed to be held at Walkerton for the trial of actions in the Chancery Division. The Official Referee set aside this notice on the ground that Rule 266 required fourteen days' clear notice to be given, according to the Chancery practice.

Held, on appeal, reversing his decision, that Rule 266 refers only to the officer with whom the entry of action for such trial should be made, and that it left the time for entry, and the length of the notice of trial, to be determined by the preceding rules; ten days' notice of trial was, therefore, held sufficient.

W. S. Gordon, for the appellant.

Langton, contra.

Osler, J.] [Oct. 20.

REGINA V. ALLBRIGHT.

Liquor License Act—Certiorari—Hard labour—Amendment of conviction.

Defendant was convicted for the third time of having sold liquor without a license, and was sentenced by a magistrate to three months imprisonment with hard labour.

Held, that the magistrate had not power to impose hard labour, the provision in that behalf in The Ontario Liquor License Act being *ultra vires*.

Where a conviction is irregular in the sentencing part, and an application is made on a certiorari to quash it, the Court will not grant an amendment of the conviction.

Foster, for the prisoner.

Hodgins, Q. C., contra.

Mr. Stephens.] [Oct. 24

SAWYER V. SHORT.

Notice of trial—Replication unnecessary—Rule 494.

Where a cause in the Court of Chancery was, on the 22nd of August last, at that stage when notice of motion for a decree or replication could have been served or filed, and no such notice or replication had up to that time been served or filed, the cause should thereafter proceed under the Judicature Act, and notice of trial may be given and the case set down without a replication being filed.

Hoyles, for the motion.

H. Cassels, contra.

Osler, J.] [Oct. 25.

IN RE TURNER & THE IMPERIAL BANK.

Division Courts Act 1880—*Interpleader—Appeal.*

There is no right of appeal from the decision of the Judge in an interpleader suit in a Division Court, even when the amount in dispute exceeds $100.

Shepley, for defendant.

Haverson, for plaintiff.

Boyd, C.] [Oct. 31.

RE PETER FLEURY: FLEURY V. FLEURY.

Partition—Motion for distribution—Costs and disbursements on—G. O. 640.

Proceedings had been taken for the partition and administration of the estate of Peter Fleury, deceased.

This was a motion for distribution under the report of the Master at Lindsay.

Crickmore, for plaintiff, asked that a lump sum be allowed him for the costs and disbursements of the motion.

Watson, for executors, objected that such costs were included in the commission allowed under G. O. 640, and that the disbursements should have been included in those allowed on the fixing of the commission, and no charges of any kind could under the practice be allowed as a separate sum on this application.

BOYD, C., made the usual order and declined

to allow any sum for costs and disbursements over and above the amounts found in the report.

Boyd, C.] [Oct. 31.

HUGHES v. REES.

Jurisdiction—Officers of Court—Rule 426—Appeals—Practice.

An application for a commission to examine a witness in New York.

The motion came before the Official Referee, who, at the request of one of the parties, referred the matter to a Judge in Chambers.

Morphy, for the application.

Kingsford, for defendant, J. Rees.

J. Hoskin, Q. C., for infant defendants.

Donovan, for defendant, Mrs. Rees.

BOYD, C., declined to entertain the application, holding that matters coming within the jurisdiction of any officer of the Court should be disposed of by him in the usual way, and the parties might then appeal if they saw fit. He would hear any case under Rule 426, on the production of a certificate of the officer in question stating that in his opinion the case was a proper one to be heard before a Judge in Chambers.

Osler, J.] [Nov. 1.

REGINA v. DUQUETTE.

Liquor License Act—Dickinson's Island—Indian land—Sale of liquor.

Defendant was convicted before the police magistrate of the town of Cornwall for selling liquor without a license on Dickinson's Island, in Lake St. Francis.

Held, on an application for a *certiorari*, that that island was part of the county of Glengarry, and therefore within the jurisdiction of the police magistrate.

Held, that the Liquor License Act applies to Indian land under lease from the Crown to a private individual.

Held, that only the holder of a license can be prosecuted under section 43 of the above Act for selling liquor on prohibited days.

Aylesworth, for the application.

Osler, J.] [Nov. 1.

RE GAUTHREAUX'S BAIL.

Bail—Estreal—Recitals in recognizance.

A recognizance of bail put in on behalf of a prisoner recited that he had been indicted at the Court of General Sessions of the Peace for two separate offences, and the condition was that he should appear at the next sittings of said court and plead to such indictment as might be found against him by the Grand Jury. At the next of said sittings the accused did not appear and no new indictment was found against him.

Held, that the recitals sufficiently explained that the intention was that the accused should appear and answer the indictments already found, and that an order estreating the recognizance was properly made.

Murphy, for applicant.

Boyd, C.] [Nov. 1.

RE JAMES.

Lunatic—Contract of—Liability.

One McNally sold a buggy to one James, an infant. James gave a pro. note for the purchase money, endorsed by his father, who was of unsound mind, and unable to understand what he was doing. No consideration passed to the father for his endorsation.

McNally was not aware of the father's condition.

Held, on appeal from the Master at Woodstock, affirming his decision, that the father's estate was not liable.

W. Roaf, for the appeal.

Boyd, C.] [Nov. 1.

LEESON v. LEMON.

Interpleader issue—Jury notice—Omission to serve—Effect of.

An order directed the trial of an issue in an interpleader matter.

The plaintiff served the issue, but did not serve with it a jury notice required by sec. 4, cap. 54, R. S. O.

He subsequently served a jury notice with the notice of trial.

The defendant did not appear at the trial, and a verdict was entered for the plaintiff, who afterwards obtained (on notice) from the Official Referee an order for costs.

Held, on appeal affirming this order, that the verdict obtained on the trial by jury was not a nullity, but only irregular, and not being moved against promptly should stand.

Hodgins, Q.C., for appeal.

Reeve, contra.

REPORTS.

RECENT ENGLISH PRACTICE CASES.

(Collected and prepared from the various Reports by A. H. F. LEFROY, ESQ.)*

ATTORNEY-GENERAL v. BIRMINGHAM, TAME AND REA DRAINAGE BOARD.

Action in nature of supplemental suit—Action to enforce judgment against successors in title—Nuisance—Injunction.

A decree was made in 1875 against the corporation of B., as the sanitary authority of B., granting a perpetual injunction to restrain them from allowing sewage to flow into a river so as to be injurious to health, or a nuisance to the plaintiffs; but the injunction was suspended for five years, to give the corporation an opportunity to execute certain works. After the expiration of this period the plaintiffs desired to enforce the injunction, but in the meantime the B. T. & R. District Board had been constituted by Act as the sanitary authority of the district, in place of the Corporation of B.

The plaintiffs brought an action against the B. T. & R. Board, claiming a declaration that they were entitled to the same benefit of the decree as against the defendants in the present action, as if they had been defendants in the former suit. The defendants demurred, on the ground that the statement of claim shewed no cause of action against them.

Held (reversing BACON, V. C.), that the demurrer must be allowed.

[May 18. C of A.—L. R. 17 Ch. D. 685.

The above head note sufficiently shows the facts. On the appeal, counsel for appellant met an expression of the M. R. in *Attorney-General* v. *Birmingham*, L. R. 15 Ch. D., 425, where he says:—"If it becomes necessary to enforce that judgment against persons who have acquired a title after it is made, an action must be brought for that purpose:"—on which the V. C. in the court below had relied,—by observing that he (the M. R.) did not say that could be done without fresh wrong being committed.

JESSEL, M. R., after remarking, *arguendo*, that under the old practice a supplemental bill, or an original bill in the nature of a supplemental bill, always alleged a fresh injury or the continuance of the old one—and after stating the facts, and observing that the action was clearly one of first impression—said:

"The first observation to be made is that this is an injunction to restrain the continuance of a tort. It is an injunction merely against the council, their workmen, and agents, and cannot be said to run with the land. If they have sold the property to somebody else, there is no injunction against the new owner, and nobody ever heard, in such a case, of the new owner or purchaser of land being liable to the former decree. If he continues the nuisance, or commits a fresh nuisance, you can bring an action against him, and that is all; he has nothing to do with the former proceedings, and I cannot see any ground whatever for supposing that he can be bound by that decree; nor, I believe, was such a thing ever heard of before. That being so, what is the case made by the present respondents? It is said, although the action would not lie in an ordinary case, yet, as this is a public body which has taken over a portion of the property of the former public body, and to a certain extent succeeded to it, this new body is bound by Act of Parliament by the former decree. Of course an Act of Parliament can do a great many things, and it can certainly make the new body bound by the old decree. Therefore, the only question remaining to be examined is, has it done so?"

This question he decides in the negative.

JAMES, L. J. agreed that the action was entirely a novel one. He had never seen such a declaratory action before. It was either wrong or unnecessary. If the defendants were liable, they were liable, and the plaintiffs did not want an action. If they were liable the plaintiff should have applied for a sequestration. The declaration of liability makes no difference. It appeared to him to be quite clear they were not liable, because there was no liability under the decree which in any way attached to the present defendants.

LUSH, L. J., held that the statement of claim was defective in two essential particulars, either of which would be fatal:—

* It is the purpose of the compiler of the above collection to give to the readers of this Journal a *complete* series of all the English decisions on pleading and practice which illustrate the present procedure of our Supreme Court of Judicature, reported subsequently to the annotated editions of the Judicature Act, that is to say, subsequently to June, 1881.

(1) It did not show any facts which would amount to a breach of the injunction, even supposing the defendants were liable.

(2) It showed no privity whatever between the defendants and the Council, against whom the injunction was awarded.

NOBEL'S EXPLOSIVES CO. v. JONES, ET AL.

Imp. O. 27, *r.* 6—*Ont. O.* 23, *r.* 7 (*No.* 184) *Amendment at hearing.*

[April 13-29—L. R. 17 Ch. D. 721.

This was an action for alleged infringement of a patent by the importation into British waters of a material manufactured abroad according to the patent process, for the purpose of having it transhipped for exportation. Evidence was given at the trial that the defendants had acted as Custom House Agents for the foreign manufacturing firm, in getting the goods landed and stored in this country.

Upon this the plaintiffs' counsel asked for leave to amend the statement of claim.

Counsel for plaintiffs cited *Budding* v. *Murdock*, 1 Ch. D. 42; *King* v. *Corke*, 1 Ch. D. 57.

BACON, V. C., allowed the amendment.

When the action came on again for hearing, on April 20, the plaintiffs, (who were suing as assignees of the British Dynamite Co., the prior holders of the patent), observed that they alleged several breaches prior to the date of the assignment to themselves; and they asked that, if it should be contended that the right of the *British Dynamite Co.* to sue did not pass to them, they should have leave to amend by making the liquidator of the British Dynamite Co. a party.

BACON, V. C.—I think the plaintiffs must confine their case to the alleged breaches since the assignment. It is now too late to amend in the way they seek.

[NOTE.—*The headnote in the L. R. refers to Imp. O.* 27, *r.* 2, (*Ont. r.* 179) *as the one under which the amendment was, in the first instance above, allowed—but as the amendment was at the trial, this seems clearly a printer's error, for Imp. O.* 27, *r.* 6, *is virtually identical with Ont. O.* 23, *r.* 7, *No.* 184].

EMDEN V. CARTE.

Imp. O. 16, *r.* 13. *Ont. O.* 11, *r.* 15 (*No.* 103).

[May 25—L. R. 17 Ch. D. 768.

In this case the plaintiff, who was an architect, sued for remuneration in respect of employment under a contract made in 1877, and for damages for an alleged wrongful dismissal from such employment in 1880. The plaintiff was adjudicated bankrupt in 1878, and had never obtained his discharge.

Held (affirming FRY, J.), that the cause of action for remuneration and damages passed to the trustee, and that the proper course was to add him as co-plaintiff in the action, and give him the conduct of the action.

[NOTE.—*The judgment concerns the point of bankruptcy law as to whether the remuneration sued for passed thereunder to the trustee. The case is noticed here merely as illustrating the adding of plaintiffs under the general order. The Imperial and Ontario Orders are virtually identical. There appears to be a clerical error in Ont. O.* 11 *r.* 15 (*c*) *in omitting the words "summons or" before "notice" in the second line thereof.*]

IN RE BRUERE.

Lunacy—Appointment of Committee out of jurisdiction—General direction to Master.

Though satisfied of expediency of appointing a proposed committee, reported by Master as not approved of *because resident out of jurisdiction*, the Court declined to appoint him until Master had certified that he would have approved *if said proposed committee had been resident within jurisdiction*..

[June 25—C. of A., 17 Ch. D. 775.

In this case the Master, by report dated June 14th, 1881, reported that B. V. M., one of three proposed committees of a lunatic, being resident out of the jurisdiction, he was unable to approve of him.

B. V. M. and the other two proposed committees then petitioned, after stating facts, that B. V. M. and another should be appointed committees "and that all matters arising in the said report and the previous reports in this matter, and the appointment of the petitioners as committees, may be referred to the Master in Lunacy for the purpose of having effect given thereto."

BAGGALLAY, L. J., after remarking that the prayer last cited was "very vague and general," said :—

"I think that the general direction should be confined to matters arising on the report of June 14th, 1881. If before the order is drawn up, it is found that there are matters provided for by the previous reports which have still to be attended to, the petition can be amended for the purpose of specifying them, but they ought not to be dealt with by mere general words."

As regards the appointment of B. V. M. the evidence of his fitness appears quite satisfactory, but it would be a departure from the usual practice, and it would be setting a bad precedent to appoint a committee who had not been approved by the Master. Here the Master does not say that he only forbears to approve of B. V. M. because he resides out of the jurisdiction, but says that he cannot approve of him, because he resides out of the jurisdiction. The Master will no doubt be ready to amend his report by saying that he should have approved of B. V. M. if he had resided in England, and upon that being done the order appointing him may be drawn up as of to-day.

LUSH, L. J., concurred.

IN RE GOWAN: GOWAN V. GOWAN.

Husband and wife—Settlement, Order for—Form of settlement approved by Court.

[Dec. 6, 1880—17 Ch. D. 778. M.R.]

In this case a testatrix bequeathed a fund to the plaintiff "until he is married, the said sum then to be settled on his wife and children." This was a friendly suit brought to settle a question which had arisen as to how the sum bequeathed to the plaintiff should be settled, he having married.

JESSEL, M. R., after observing that what Fry, J., is reported to have said in *Oliver* v. *Oliver*, 10 Ch. D. 765, appeared to him to be contrary to the opinion expressed by Baggallay, L. J., in the case of *Cogan* v. *Duffield*, 2 Ch. D. 44, 49, quoted the said opinion, and *mut. mut.* (the fortune not being *the wife's* in this case) acted upon it.

The opinion of Baggallay, L. J., as quoted by the M. R., is as follows:—

"The mode of settling a wife's fortune which is approved by the Court is to give her the first life interest for her separate use, then a life interest to the husband, then, subject to powers given to the husband and wife of appointing the fund among the issue of the marriage, it is given equally to such of the children as being sons attain 21, or being daughters attain that age or marry, or else to the children equally, with gifts over in favour of the others, if any of them being sons die under 21, or being daughters die under that age and unmarried."

[*The form of the judgment is given in extenso in the Law Reports.*]

BROOKE V. BROOKE.

Evidence—Notarial document—Imp. Chy. Proc. Act (15 *and* 16 *Vict. c.* 86) *s.* 22.

A deed, the execution of which has been duly attested by a colonial notary, although there may be no evidence that the attestation was for the purpose of using the deed in Court, is nevertheless a document "to be used in Court" within the above Imp. statute, and the Court will take judicial notice of the notary's seal and signature.

[May 3—L. R. 17 Ch. D. 833.

The deed which was tendered in evidence in the above case had been executed in Canada, and was signed by and attested by the seal of a notary public.

FRY, J.—A document is tendered to me which bears a notarial seal, being a deed of release. The only objection to that evidence is that the person appearing to act as a notary is not proved to be a notary.

The section under which it is sought to put the document in is the 22nd sec. of the Chan. Proc. Act, 1852. Now, the words of that section are somewhat peculiar. It provides that the Court shall take judicial notice of the seal and signature of a notary public in Her Majesty's Colonies attesting certain pleadings, affidavits . . . . . "and all other documents to be used in the Court."

In my judgment the only true construction of the section is that it includes all documents to be used in the Court, and this is a document to be used in the Court. I shall therefore admit the document.

[NOTE.—*Sec.* 38 *of our Evidence Act, R.S.O. c.* 62, *may be compared with Imp.* 15 16 *Vict. c.* 86. *s.* 22: *and especially the words in it,*—"*for the purposes of . . . any cause, matter,*

or thing, depending, or in anywise concerning any of the proceedings to be had in the said Courts."]

BEWICKE v. GRAHAM.

Imp. O. 31. *r.* 11—*Ont. O.* 27. *r.* 3. (*No.* 221.) —*Discovery and inspection—Affidavit of documents—Privilege.*

[March 16. C. of A.—L. R. 17 Ch. D. 400.

In this case the defendants, in an affidavit of documents made pursuant to an order for discovery, stated as follows:—

"We have in our possession or power certain documents numbered 101 to 110 inclusive, which are tied up in a bundle marked with the letter A., and initialed by the deponent 'C. G;' the said documents relate solely to the case of the defendants and not to the case of the plaintiff, nor do they tend to support it, and they do not, to the best of our knowledge, information, and belief, contain anything impeaching the case of the said defendants, wherefore we object to produce the same, and say they are privileged from production."

On appeal from the decision of a Judge at Chambers, the Divisional Court refused to order, under Imp. O. 31, r. 11, the production of the documents which the defendants so objected to produce.

Counsel for the plaintiff argued that the affidavit must show the nature of the documents so that the Court may judge whether the objection to produce them is reasonable, and cited *Felkin* v. *Lord Herbert*, 30 L. J. (Ch.) 798; *Taylor* v. *Batten*. 4 Q. B. D. 85; *Bustros* v. *White*, 1 Q. B. D. 423. If it is admitted, as here, that the documents are material, they must be produced; *Goodall* v. *Little*, 20 L. J. (Ch.) 132; *Jenkins* v. *Bushby*, 35 L. J. (Ch.), 400; *Adams* v. *Lloyd*, 3 H. & N. 351, per Pollock, C. B. There is a material distinction between title deeds and other documents.

Counsel for defendants argued the defendants were entitled to rely on the affidavit, which is conclusive: *Jones* v. *Monte Video Gas Co.*, 5 Q. B. D. 556; *Minet* v. *Morgan*, L. R. 8 Ch. 361. The rules of the Court of Chancery as to production of documents, still apply, notwithstanding the Judicature Acts: *Bustros* v. *White* supra; *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644. The affidavit is in conformity with *Taylor* v. *Batten*, 4 Q. B. D. 85; *Minet* v. *Morgan*, supra.

The judgments of the Divisional Court are too lengthy to give verbatim. WATKIN WILLIAMS, J., differed from the other Judges, holding the documents should be produced. He said a distinction should be drawn between an application for a further affidavit of discovery, and for an order to produce for inspection relevant documents, known to be in the defendants' possession, which was the present case. *Jones* v. *Monte Video Gas Co.*, (supra), was a case of the former kind, and was decided on the principle that it is obviously beyond the power of any Court to order any party to swear to particular facts when he determined to swear the contrary; and so it is no authority on the question before the Court. There have been cases in which a Judge, having refused to order a further affidavit of discovery on this ground, has nevertheless ordered the production of the controverted document, being satisfied that it was relevant to the case. In the present case the defendants, he considered, had failed to show that the documents (the possession and relevancy of which they admitted) came within any class of documents privileged from inspection. They content themselves with a wide, genera and vague statement that the documents relate exclusively to the case of the defendants, and not to that of the plaintiff, and do not sufficiently enable the Court to test substantially the grounds of the claim of privilege upon sworn testimony which, if untrue, would have subjected the defendants to an indictment for perjury, whereas this was done in *Bustros* v. *White* (supra). Therefore the order for inspection ought to have been made.

POLLOCK, C.B., was of a contrary opinion, holding the order of the Judge in Chambers to be right. He observed that in construing the present rules of practice it is impossible to forget that they were drawn from the practice of the Courts of Equity; and that the only case in which documents for which protection was claimed on the ground of privilege were ordered to be produced, was where the person declining to produce them had waived his privilege, by referring to them in pleadings or affidavits so as to disclose the contents; and cited Wigram on Disc. Ed. 2, p. 299, and *Herbert* v. *Dean and*

Chapter of Westminster, 1 Y. & C. Ch. 103. He also referred to *Jones* v. *Monte Video Gas Co.* supra, and observed that the only distinction between that case and the present is that in the former the ground on which production was declined was that the documents were said to be not material or relevant to the action. Here the defendants said the documents relate solely to their case. But the practice indicates no distinction on this ground.

DENMAN, J., observed that in the absence of authority he would have favoured the view of Williams, J., but that the cases in Equity since the Judicature Act prevented the Court saying the judgment of the Judge in Chambers was wrong. He cited *Taylor* v. *Batten*, 4 Q. B. D. 85; Seton on Decrees, 4th ed. pp. 162, 163; *Jenkins* v. *Bushby*, 35 L. J. (Ch.) 400, as to meaning of word "title" and *Jones* v. *Monte Video Gas Co.*, supra, as to which case he said he could not agree with Williams, J., that it did not bear on the subject, but it is evident from the judgment that the Court laid down the principle that the party asking for discovery or inspection is bound by the oath of the opposite party, and, that oath being taken at his peril, the matter is concluded by it, not only as ts discovery, but so far as the consequences are concerned, viz., inspection.

The plaintiff appealed, and on the above date the case came before the Court of Appeal, all three judges agreeing in dismissing the appeal.

LORD COLERIDGE, C. J., in the course of his judgment said:—"I think our decision may be put on O. 31, rule 11 itself, which gives power to order the production of such documents 'as the Court or Judge shall think right,' and that we may say that we do not think it right to order the production of any of the documents sought to be inspected, and that the discretion of the Judge and of the Court below was rightly exercised. That would be sufficient to dispose of this matter, but I am inclined to go further and to say that it is concluded by what is laid down in *Jones* v. *M. V. Gas Co.*, supra, and *Taylor* v. *Batten*, supra. Now, as I understand these cases, the principle is this, that on an application for discovery or inspection, which, I apprehend, are substantially the same thing, the applicant is bound by the affidavit made in answer to the application, if the documents referred to in it are sufficiently identified, to enable the Court to order their production, should the Court think right to do so. Here the documents are sufficiently identified, for the affidavit in this respect is almost in the very words which were used, and held to be sufficient, in the affidavit in *Taylor* v. *Batten*. . . . If the affidavit sufficiently describes the documents for the purpose of identification the other party can go no farther, whether he seeks discovery or inspection."

BAGGALLY, L. J., and BRAMWELL, L. J., concurred on similar grounds.

Appeal dismissed.

[*Imp. O.* 31, *rule* 11 *and Ont. O.* 27, *r.* 3 *are virtually identical.*]

MCLAREN V. HOME.

Imp. 31-32 *Vict. c.* 125 *and Rule* 5.—*Ont.* 37 *Vict. c.* 10, *sec.* 53. *C. and General Rule* 33.

Election Petition — Witnesses — Expenses — Taxation.

[May 3.—L. R. 7, Q. B. 477; 50 L. J. R. 658.

Although the amount of the reasonable expenses to be paid to any witness in an election petition may, under the above Imp. Act and Rule (r. 5. additional General Rules, 1875), be ascertained and certified by the registrar, his certificate is not conclusive of the amount as between the petitioner and respondent, but it is, as part of the general costs of the petition subject, under sec. 41, to taxation by a master who must exercise his discretion on the expenses certified.

[NOTE.—*Imp.* 31-32 *Vict. c.* 135, *sec.* 34 *appears to be virtually identical with the Dominion Controverted Elections Act*, 1874 (37 *Vict. c.* 10 *C.*) *sec.* 53: *while our General Rule* 5, *made under the latter act, provides as follows:* "*The reasonable costs of any witness shall be ascertained by the Registrar of the Court, and the certificate allowing them shall be under his hand.*" *Sec.* 41 *of the Imp. Act is virtually identical with sec.* 60 *of the Dom. Act. It does not appear necessary to do more than note the decision here.*]

NORMAN V. STRAINS.

Compromise of probate proceedings before writ issued—Effect of compromise an infant and married woman.

[Nov. 30, C. of Prob.—45 L. T. 191.

In this case the President of the Court of

Probate was asked to confirm an arrangement which had been entered into between the parties, prior to the issuing of the writ, and in such manner as to bind a married woman and five infants. He, however, refused to do so, and gave the following as his reasons :—

"At present no action has been commenced in this division, and no issue, therefore, is pending. There has been a proceeding by caveat and warning it is true, but no writ has been issued, and under the Judicature Act the only mode of commencing an action is by issuing a writ. There is not, therefore, any litigation before the Court, and no sufficient ground upon which the Court can proceed. Moreover, in addition to this, I cannot see, if I rightly appreciate this case, any circumstances under which I should be justified in binding irrevocably infants to the consequences of any compromise into which the parties may think fit to enter, in a probate suit before me, and I am extremely unwilling to do so. I am not furnished with any materials upon which to form a judgment as to the wisdom and forethought of any compromise which the parties may have agreed upon. It is my function to determine whether a particular will is or is not the will of the deceased person. To enable me, however, to appreciate the reasons upon which counsel have arrived at the conclusion that it is prudent to effect a compromise by arrangement, it would be necessary that I should be informed, not merely of the contents of their briefs, but also of the effect created by the evidence upon those persons who have seen and examined any witnesses up to this point in the case."

Motion refused.

CORRESPONDENCE.

Local Legislatiures—Jurisdiction—Naturalization.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—I observe in your issue for Oct. 15, some remarks in regard to the sec. 4 of the Dominion Act of last Session respecting Naturalization and Aliens, which introduces a new principle into the law, as hitherto administered in Canada.

In commenting on this subject, in my work on Parliamentary Government in the Colonies (p. 218) I had pointed out the fact that, previous to the passing of this Act, while the Dominion Parliament was exclusively empowered, under our new Constitution, to legislate upon "naturalization and aliens," yet that the Legislatures of Ontario and of Manitoba had severally assumed that they were exclusively competent to authorize aliens to hold and transmit real estate. These legislatures had accordingly passed laws for this purpose. None of the other legislatures, to my knowledge, have passed similar laws. But by the omission of any provisions of this nature in previous Dominion Statutes concerning aliens, it might be inferred that the Dominion Parliament had advisedly relinquished to the local legislatures the discretion and authority of such legislation, as affecting "property and civil rights."

Now, by the 4th section of the recent Dominion Act, the Parliament of Canada steps in and proceeds to legislate on this very question, by providing that aliens may hold, convey, and transmit property of any kind, in all respects as natural-born British subjects, subject to certain restrictions therein stated.

The point might be raised, whether this new provision in the Dominion law was at variance with Provincial rights of legislation. But no difficulty on this score presents itself to my mind. Before reading your observations upon it I had appended a manuscript note to page 218, in these words, "it being understood that the concurrent rights of legislation in the several provinces are not thereby infringed." This distinction was fully brought out in the Debates on the statute of 1881, as a reference to pp. 1342 and 1369 of the Debates of last Session will show.

The question of "exclusive" jurisdiction, by either the Dominion Parliament, or any Provincial Legislature, under the B. N. A. Act is sometimes difficult and uncertain. But thanks to the careful attention bestowed upon the rightful interpretation of the Imperial Statute by our Courts of law, and to the luminous decisions of some of our leading judges, it is gradually becoming easy of administration.

So far as concerns what may be termed "concurrent" rights of legislation, by both bodies, and particularly the competency of the Dominion Parliament itself to provide for the

holding of property by aliens—it may be worth while to call attention to the following extract from my note-book of recent cases on this head :—

"By a decision of the Privy Council (in the case of *Cushing* v. *Dupuy*) it is declared to be a necessary implication that the Imperial Parliament, in assigning to the Dominion Parliament the subjects of Bankruptcy and Insolvency, intended to confer on it legislative power to interfere with 'property, civil rights and procedure' within the provinces, so far as a general law relating to those subjects might affect them. Such legislation, upon any subject within the prescribed powers of the Dominion Parliament, would not infringe the exclusive power given to the provincial legislatures. On the other hand, upon the same principle—but in confirmation of the just exercise of provincial powers, in a matter of civil rights—it has been held by a judgment in appeal by the Court of Queen's Bench in Montreal, that the Quebec Pharmacy Act of 1875 was not *ultra vires* of the Local Legislature although it trenched incidentally upon the subject of 'trade and commerce' exclusively assigned to the Dominion Parliament."

Thus—and particularly within the past two years—general principles of the first importance in the interpretation of the British North America Act of 1867 are being evolved out of the various cases in litigation before our Courts.

ALPHEUS TODD.

Ottawa, Oct. 24, 1881.

County Court practice under the Judicature Act.

To the Editor of the CANADA LAW JOURNAL :

SIR,—The question has arisen in our County Court as to whether the Chancery or Common Law practice should prevail in obtaining an examination of parties ; whether it can be done only after cause at issue, or so soon as statement of defence filed or time for filing it has expired.

There can be no doubt as to the Chancery practice being the better way under the present mode of pleading, for the plaintiff ought in all cases to have the right to examine the defendant before being compelled to reply, and further the plaintiff can now be delayed three weeks without joining issue, before the cause is at issue without a joinder being filed.

The whole tenor of the Judicature Act is to make one rule govern both as to Law and practice, and where Law and Equity differ Equity is to govern. And does not this apply to practice and procedure as well as to the Law ?

Section 12 of the Judicature Act provides that when the practice and procedure is not provided for by the act and rules or orders, the old practice and procedure shall in the Court of Appeal and High Court of Justice be exercised in the same manner as the same might have been exercised by the old Courts, but it does not provide that the Common Law divisions shall follow the old Common Law practice and the Chancery Division the old Chancery practice.

Section 17, sub-sec. 10, provides for the rules of Equity governing when a conflict between them and Common Law rules exists. In *Grant* v. *Holland, Ross* v. *Grant*, L. R. 3 C. P. D. 180, it was held that in changing solicitors the rules of Equity as to practice must prevail, so that the words "Rules of Equity" will apply to practice and procedure as well as to the law. And should not therefore the old Chancery practice be followed in this matter ? Mr Holmested in his Manual says not. What say you ?

Yours etc.,

W. B.

[See editorial comments, ante, p. 419 EDS. C. L. J.]

FLOTSAM & JETSAM.

A WESTERN constable held an execution against a farmer, and when he called for a settlement, the agriculturist took him out into a big pasture and pointed out a wild steer as the particular piece of property that could be levied upon. The constable chased the steer around for a while and then sat down, and taking out his book began to write. "What are you doing there ?" asked the granger. "Charging mileage," replied the constable, without looking up. "Do I have it all to pay ?" gasped the rancher. "You bet." "Then take this tame heifer here. I can't stand any such game as that."

Law Society of Upper Canada.

OSGOODE HALL.

TRINITY TERM. 45TH VICT.

During this Term the following gentlemen were called to the degree of Barrister-at-Law. The names are placed in the order of merit:—

CALLED WITH HONOURS.

John Henry Mayne Campbell.

CALLED.

George Anthony Watson, John Sanders Macbeth, Horace Edgar Crawford, George Gordon Mills, Jeffrey Agar McCarthy, Charles Miller, Allan McNab, James Scott, Conrad Bitzer, William Elliott Macara, Samuel George McKay, James Brock O'Brian, Frederick Herbert Thompson, Frederick William Kittermaster, Alexander Ford, James Walter Curry, Edward Norman Lewis, Frederick Case, Abraham Nelles Duncombe, William Franklin Morphy.

The following gentlemen who passed their examination in Easter Term, 1881, were also called to the Bar this Term:—

Frederick Faber Harper, Solomon George McGill.

The following gentlemen were admitted into the Society as Students-at-Law, namely:—

GRADUATES.

Hugh St. Quentin Cayley, William Durie Gwynne, Thomas Chalmers Milligan, Alpin Morrison Walton, Douglas Armour, Thomas B. Bunting, Walter Laidlaw, Thomas Joseph Blain, George Washington Field, Samuel Clement Smoke, Henry Herbert Collier, Frederick W. Hill, Charles William Lasby, John Bell Jackson, James Metcalf McCallum, Thomas Edward Williams, George Morton, Frederick Ernest Nellis, Alexander Cameron Rutherford, Frank Henry Keefer, Lucius Quincy Coleman, Henry Thomas Thibley, Joseph Wesley St. John, John Douglas.

MATRICULANTS OF UNIVERSITIES.

Edward W. Hume Blake, Herbert Carlton Parks, Edward Charles Higgins, William H. Holmes, R. S. Smith, John Wesley White, John Paul Eastwood.

JUNIOR CLASS.

William Murray Douglas, George Marshall Bourinot, Thomas Urquhart, Alexander William Marquis, John Bell Dalzell, Osric L. Lewis, Frederick Stone, Alexander David Hardy, Donald James Thomson, Joseph Coulson Judd, Parker Ellis, John O'Hearn, Francis McPhillips, Henry Clay, Robert Casimir Dickson, Arthur Clement Camp, John Carson, Douglas Harington Cole, Thomas Steele, Andrew Charles Halter, Matthew Joseph McCarron, Robert G. Fisher, Charles Meek, W. H. F. Holmes, Paul Kingston, Harry George Tucker, Richard Vanstone

And the Preliminary Examination for Articled Clerks was passed by William Mansfield Sinclair.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

Articled Clerks.

1881.
- Ovid, Fasti, B. I., vv. 1-300; or, Virgil, Æneid, B. II., vv. 1-317.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History—Queen Anne to George III.
- Modern Geography—N. America and Europe.
- Elements of Book-keeping.

In 1882, 1883, 1884 and 1885. Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

Students-at-Law

CLASSICS.

1881.
- Xenophon, nabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero in Catilinam, II., III., IV.
- Ovid, Fasti, B. I., vv. 1-300.
- Virgil, Æneid, B. I., vv. 1-304.

1882.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum, (B. G. B. IV. c. 0-36, B. V., c. 8-23.)
- Cicero, Pro Archia.
- Virgil, Æneid, B. II., vv. 1-317.
- Ovid, Heroides, Epistles V XIII.

1883.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum.
- Cicero, Pro Archia.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Heroides, Epistles V. XIII.

1884.
- Cicero, Cato Major.
- Virgil, Æneid, B. V., vv. 1-361
- Ovid, Fasti, B. I., vv. 1-300.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.

1885.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Ovid, Fasti, B. I., vv. 1-300.

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VOL. XVII. DECEMBER 1, 1881. NO. 22.

DIARY FOR DECEMBER.

1. Thur..Re-hearing Term in Chancery begins.
4. Sun..*2nd Sunday in Advent.* Armour, J. sworn in, Q. B., 1877.
6. Tues..County Court sitt. for York begin.
10. Sat..Michaelmas Term ends.
11. Sun..*3rd Sunday in Advent.* Blake. V. C., sworn in, 1872.
13. Tues..County Court sitt. (ex. York) begin.
15. Thurs..Christmas vac. in Supreme Court and Exch. Ct. begin. Morrison, J., sworn in, Ct. of Appeal, 1877.
17. Sat..First Lower Canada Parliament met, 1792.
18. Sun..*4th Sunday in Advent.*
22. Thurs..Shortest day.
24. Sat..Court of Appeal and Chancery vacation begin.
25. Sun..*Christmas Day.*
26. Mon..U. C. made a Province, 1791.
27. Sj ragge, V. C., appointed Chancellor, 1879. Municipal nominations.
31. Sat..Rev. Stat. of Ont. came into force, 1877.

TORONTO, DEC. 1, 1881.

LORD JUSTICE BRAMWELL having retired into private life, his place has been filled by Mr. Justice Lindley. Mr. Ford North, Q. C., takes the seat vacated by Mr. Lindley in the Queen's Bench Division. Though not very prominently before the profession, Mr. North's appointment was not a surprise, and Lord Selborne is praised for continuing his practice of appointing Judges apart from political and party claims. Lord O'Hagan has also retired and is succeeded by Mr. Law.

MR. JOSHUA WILLIAMS, Q. C., died on the 25th Oct., at the age of 68. Though an eminent real property lawyer, and engaged in many important cases, his reputation will rest mainly on his well-known works on Real Property and Personal Property. These books have gone through thirteen and eleven editions respectively, and are perhaps the best known legal text-books in the English language. Mr. Leith is publishing a Canadian edition of Williams on Real Property which will be issued shortly.

The great majority of the profession will, probably, receive with much pleasure the report that the Law Society has at length resolved to re-establish the Law School for a period of three years at all events. Lectures have long been delivered under the auspices of the Inns of Court in London, and Lord Selborne is a leader in a movement to carry still further the objects with which the lectures were started. Apart from all question of the practical usefulness of such courses of instruction, it must be obvious to all that the more scientific and the more intellectual a lawyer's training, the more keenly he will feel the noble nature of his profession when viewed aright, and the more impossible he will find it to stoop to any of those "tricks of the trade" which have sometimes, in every country, brought discredit and odium on its name.

WHATEVER the cause may be which has delayed the renewal of courses of lectures under the auspices of the Law Society, one good result has ensued. In every community spontaneous effort for the public good is of more value than the forced product of State help, inasmuch as the former strengthens the powers of self-reliance and self-denial. So on the same principle,—*Si parva licet magnis componere rebus*—there is every reason to congratulate the Legal and Literary Society on the energy it has shown, and the success it has attained in providing in some measure, out of its own resources, the means of self-improvement. We are glad to hear that there

is a probability of the lectures now being delivered to its members being speedily published, and rejoice that the demand for greater advantages of scientific training on the part of the rising generation of lawyers has met with due recognition in high quarters.

CIRCUMSTANTIAL evidence is said to be illusory or satisfactory "according to circumstances." It is generally, and very properly, supposed that a post-mark on a letter may be relied upon with some degree of certainty that it truly gives the date of actual stamping. A case, however, recently occurred at the post-office of a large city in Ontario, which is rather startling to a blind believer in P. O. routine. On Oct. 29 a letter was posted, and the next morning it was delivered to its proper owner, the envelope being stamped Sept. 29. Let us suppose this mistake not to be noticed for a year or so, and then the envelope to be put in evidence to prove the date of a certain occurrence, would not a jury, as a matter of course, believe the "circumstance" in preference to the oath of the most respectable witness who might state the actual date of the posting of the letter; and yet in this case the circumstance would lie and possibly be the means of doing a grievous wrong.

THE CONSOLIDATION OF THE DOMINION STATUTES.

The Dominion Government have at last taken a step towards the consolidation of the Statutes over which the Parliament of Canada have jurisdiction, by the appointment of the Honourable James Cockburn, C.C., as "Commissioner for the preliminary revision and consolidation of the Dominion Statutory laws." During Mr. Mackenzie's administration, an appropriation was made for the purpose of this consolidation, and we believe, Mr. Thomas Langton, Barrister-at-law, prepared some preliminary matter; but owing to the change of Government no commission was appointed, and the matter has been allowed to rest until the present time. Of the need of this work it is unnecessary to enlarge; it is simply indispensable. It will be a work of great magnitude and extreme difficulty, as it covers not only the consolidation of the Dominion Statutes passed since the time of Confederation, but includes all the statutory laws enacted by the various provinces anterior to that time, and over which the Dominion Parliament have now jurisdiction. To consolidate, revise, and harmonize such a heterogeneous mass of legislation will take considerable time, and to decide the innumerable constitutional questions involved will require the greatest possible care. We presume a commission composed of Judges and Barristers, similar to that appointed by the Ontario Government, will shortly follow, and we trust that the preliminary matter will be soon in a shape to enable them to proceed with this much needed compilation.

We congratulate the Government on securing the services of Mr. Cockburn, a gentleman eminently qualified for the careful carrying out of the difficult work appointed him. Mr. Alexander Ferguson of Ottawa will make an efficient Secretary.

RECENT DECISIONS.

Nos. 1 and 2 of Vol. 32 of our Common Pleas reports now lie before us for review. The first case is *Re Mead* v. *Creary*, which decides two new and important points of Division Court procedure, and which came before the full Court on return of a rule *nisi*, obtained on behalf of the primary creditor, to rescind an order for a prohibition, made in Chambers, by Cameron, J., at the instance of the garnishees, on the ground of want of jurisdiction. The case in Chambers is re-

ported in 8 P. R. 374. Two points came up for decision. The first was:—Does sec. 14 of 43 Vict., c. 8, which requires that where a defendant, primary debtor or garnishee intends to contest the jurisdiction of any Division Court, he is to give a notice to that effect to the clerk of the Court within a certain number of days after the service of the summons on him,—relate merely to cases where the cause of action being within Division Court jurisdiction, the suit is brought in the wrong Court,—or is it intended to apply to all cases where jurisdiction is disputed? Cameron J. decided in favour of the restricted interpretation, and the full Court now upholds his decision on this point; holding, (per Osler, J., p. 3):—"The notice mentioned in this section is only required when a suit otherwise of the proper competence of the Division Court has been brought in the wrong division, and the section does not operate to give jurisdiction in default of notice as to causes of action over which the Division Courts Act expressly enacts, those Courts shall not have any jurisdiction."

Differing opinions on this subject were expressed by the authors of the two works we have on Division Court law. Mr. Sinclair laid it down if no notice given that "the parties may be said to have tacitly agreed that, whether the matter is beyond the jurisdiction or not, they are willing, for reasons best known to themselves, to have it disposed of in the Division Courts." Mr. O'Brien, on the other hand, interpreted the section as referring not to *amount*, which was definitely limited by other sections nor to other matters wherein no jurisdiction was otherwise given, but merely to *locality*. The Court has arrived at the same conclusion.

The second point was as follows:—Can a primary creditor garnish part of a debt due by a third person to the primary debtor for which, as between the primary debtor and the garnishee, a suit could not be maintained in the Division Court by reason of the amount being in excess of the jurisdiction? Cameron, J., held he could not, but the full Court have reversed his decision on this point. The former grounded his decision on sec. 136 of the Division Courts Act (R. S. O., c. 47), which enables the primary debtor, garnishee, and other parties interested to set up *any defence*, as between the primary creditor and the primary debtor, or as between the garnishee and the primary debtor, which the latter would be entitled to set up in an ordinary suit; and held that want of jurisdiction is a defence open to the garnishee, and that as a result of such a defence being allowed, the jurisdiction of Division Courts in proceedings to attach or garnish debts is limited to debts within the proper competence of such Court to try. The full Court, however, observed (per Osler, J., p. 4,) that if the objection, thus upheld in Chambers, was well founded, it was singular that the question did not appear to have before arisen, and they held that it is not necessary or consistent with the other provisions of the Act to give so wide a meaning to sec. 136 as that given by Cameron, J. "The defences," (per Osler, J.,) "which the garnishee and other parties are permitted to set up are defences either to the claim of the primary debtor or the debt sought to be attached. . . . . An objection to the jurisdiction is not a defence to the claim, but to the competency of the Court." And after a review of the various sections of the Division Courts Act applicable to the question raised, they held in the words of Wilson, C. J., p. 9. "The whole scope and scheme of the Act are, to leave the Judge, in case of garnishment, unfettered in his action in dealing with the debts of the primary debtor for the purpose of satisfying the claims of the primary creditor, because the Judge is only to take out of the debt which the garnishee may owe as much as will pay the primary creditor his demand, which must be one within the competence of the Division Court." The same view was expressed by Mr. O'Brien in his Manual for 1879, at p. 111.

The next case, *Sutton* v. *Armstrong*, turned upon the question whether two chattel mortgages, and the goods comprised in them, passed under the operative words of an assignment made by the mortgagee, part of which were "all mortgages . . and also all and singular other the real and personal estate, wheresoever situate," of the assignor, and Osler, J., held that the terms were so comprehensive and all-embracing that in the absence of any evidence to show the mortgages were not intended to pass, they must be held to have passed; but that in the case of one of the mortgages there was such evidence, since at the time of such assignment the mortgagee was not the beneficial owner of it, but inasmuch as it was given to secure certain promissory notes, the then holder of the notes was in equity entitled to the security.

The next case, *Montreal City and District Savings Bank* v. *Perth*, was an action an a debenture, by which the defendants agreed to pay to the bearer £200 at the office of a named bank on a named day, upon presentation and surrender there of the debenture, and the principal question was whether the plaintiffs were required by the debenture to demand payment or to make presentation of the debenture at the time and place specially named for payment, and it was held by Osler, J., and afterwards by the full Court, that the presentation and surrender of the bond was a condition precedent, that these acts on the part of the plaintiffs were concurrent acts which they were to perform, or to be ready and willing to perform, at the same time and place the defendants paid or tendered, or were ready and willing to pay or to tender the money. It was also held that after failure to make a due presentation, there could be no recovery until a demand was made for payment, which must be made on the defendants. So far as the case concerned the form of pleadings under the old practice we need not further notice it.

In *Walton* v. *County of York* a rule *nisi* had been obtained in a certain action to enter a non-suit, or for a new trial, and the Court made it absolute to enter a non-suit. The plaintiff thereupon appealed, and the Court allowed the appeal, but made no order as to that portion of the rule *nisi* in which a new trial was asked, leaving it to be disposed of by the Court *a quo*. It was now held, however, that the rule *nisi* was completely and finally disposed of, so far as that Court was concerned, by the rule to enter a non-suit, which the defendants, by taking it without asking that any reservation should be made of that part of it relating to the new trial, had acquiesced in. It was also held by a majority of judges, that the Court of Appeal had no power, under sec. 23 of the Court of Appeal Act. (R. S. O c. 38) to direct the Court *a quo* to reopen the rule or reconsider the question whether in their discretion a new trial should be granted. It appears, therefore, that if the question had been raised in *Hamilton* v. *Myles*, 24 C. P. 309, the course there taken could not have been maintained.

In the next case of *Carlisle* v. *Tait*, p. 47, the principal questions were as follows: (1.) Whether it is necessary that the affidavit made by the mortgagee's agent under sec. 1 of the Chattel Mortgage Act (R. S. O. c. 119) should show he was acquainted with all the facts and circumstances connected with the giving of the mortgage; or whether that could be proved *aliunde*? and (2.) how far a purchaser at a sale by the mortgagees under their power of sale, who leaves the mortgagor in undisturbed possession, require renewed protection by registration? As to the first question, the Court decided that it ought to appear either in the affidavit of the agent, or in some other way from the chattel mortgage or the papers filed under it, that the agent is aware of the circumstances connected with the transaction. As to the second question, Wilson, C. J. expresses his opinion, p. 49, that the purchaser is pro-

tected so long as the mortgage under which he bought has the protection given to it by the registration; and that such protection will continue whether the purchaser is a mere assignee or holds under the power of sale; but that when the term of the mortgage expires the purchaser is no longer protected, unless he take actual possession, or procure and register a mortgage in his favour, and he cites an English case in support. Osler, J. however, declined to express any opinion on this second point, on the ground that the terms of the English Bills of Sale Act are so different from ours. Galt, J., gave no judgment.

The next case of the *Canada Permanent L. and S. Co'y* v. *McKay*, p. 51, needs only a passing notice. It was an action of ejectment. The step-brother of the defendant, the registered owner of the legal title, mortgaged to the plaintiffs, who had no notice of certain equities claimed by the defendant against the said legal owner. The plaintiffs were, therefore, declared entitled, as purchasers for value without notice, to all except a small portion comprising the house and garden. This portion had always been deemed the defendants' special property, and he had always exclusive possession thereof, and, therefore, *although his aforesaid step-brother had also always resided on the land, and had worked it jointly with the defendant*, the latter was held to have acquired a title to the portion comprising the house and plot, under the Statute of Limitations by reason of his exclusive possession of it.

In the next case requiring notice, *Mills* v. *Kerr*, p. 68, an assignment of all the goods and effects in and about the dwelling house of a member of an insolvent firm, made for the benefit of the partnership creditors only, was held to be a fraudulent preference, inasmuch as there were proved to be also separate creditors; and it was also held that the intent of the parties to include the separate creditors could not be proved by parol evidence, for "the intent in the statute mentioned, to defraud, etc., must be governed by the terms of the instrument alone;" (per Wilson, C. J.)

The case of *Ontario Bank* v. *Mitchell*, p. 73, shows that in the examination of a judgment debtor under R. S. O., c. 50, sec. 304 (Jud. Act, O. 41, r. 1), "the chief object is to show what property the debtor has at the time of the examination which can be made available to the creditor, and it is material in making or in the attempt to make out present property, to show that at some anterior time, no matter how far back, the debtor had property, and to get an account from the debtor where that property is, or what has been done with it," (per Wilson, C. J.); and therefore the enquiry is not restricted to the period of the contracting of the debt, but it may be shown that at some anterior time, no matter how far back, the debtor had property, as to which he may be required to give an account; and it is not sufficient answer to the enquiry merely to say that it has all been disposed of before the debt was incurred.

The next case, *Lee* v. *Public School Board of Toronto*, is a decision on sec. 13 of the new School Law, (44 Vic., c. 30). This section forbids a public or high school trustee (1) to enter into any contract, agreement, engagement, or promise of any kind, either in his own name, or in the name of another, and either alone or jointly with another, or in which he has any pecuniary interest, profit, or promised or expected benefit, with the corporation of which he is a member; or (2) to have any pecuniary claim upon or receive compensation from such corporation, for any work, engagement, employment, or duty on behalf of such corporation. The section then declares (3) that every such contract, agreement, engagement, or promise shall be null and void; (4) that such trustee shall *ipso facto* vacate his seat, and (5) that a majority of the other trustees may *declare the same* accordingly. It was decided in the above case, though with some doubt on the part of Osler, J. (see his judgment, page 87),

that what the section prohibits is the act of the trustee himself—something for which he is directly responsible, or can control, or can individually do or refrain from doing or being a party to; and therefore it was held that the fact of the Public School Board of the City of Toronto entering into an agreement with and purchasing their stationery and school supplies from a publishing company, and having obtained gas from a gas company and insured their property in certain insurance companies, of which said companies the plaintiff was a shareholder, did not disqualify him from acting as a trustee of the School Board, or render his seat vacant under the above section.

The case of *Oliver* v. *Newhouse*, p. 90, was an interpleader issue arising from seizure by an execution creditor of certain goods, under circumstances which are succinctly given by Wilson, C. J., in the following passage from his judgment:—"From the evidence it appears there was a verbal lease of the farm made by the father to the son for five years, determinable at any time at the will of either of them, and the son was to have the use of the stock and implements on the farm to enable him to work it; and for the farm and stock the son was to pay the father $100 a year and support the father and his family, who all lived on the farm. The son had the right to sell and deal with the chattel property as he liked, and he was to leave upon the farm at the termination of the lease as much value in chattels as he got, and whatever there was at that time above the value given to him was to be his own. The son carried on the farm under that agreement until January, 1879, when he left the place, and the father assumed possession of the land and chattels as his own. In March, 1878, the son formally surrendered the farm and crops to the father, and in April a final settlement was made between the the father and the son, the son giving up all his interest in the chattel property to his father. After that settlement these goods were taken in execution for the son's debt, and the question is, whether the goods so seized were at the time the property of the father or of the son." Wilson, C. J., and Galt, J., concurred in holding that the goods demised to the son gave him only a limited interest for the duration of his term, that those goods he got as lessee, and did not part with under the power he had, remained just as if there had been no such power given: that the goods brought on to the farm in lieu of the demised goods sold or exchanged by the lessee became subject to the terms of the demise just as the goods were and had been for which they were substituted. But if not, the substituted goods did, by the termination of the tenancy, by will of the lessor in January, 1879, when the son left the farm and the father took possession of it and of the goods upon it, and by that act of seizure and possession as of right by the father revest the residue of the original goods in the father and vest the substituted goods in the father as the former owner and lessor. Osler, J., on the other hand, held that the transaction amounted to a sale of the goods, and that the property became the property of the execution debtor liable to be seized on an execution against him.

The last case, *Regina ex rel. O'Dwyer* v. *Lewis*, was an appeal from the decision of the C. J. of the Court of Q. B. The question in dispute was, whether a County Court Judge having granted his fiat for the issue out of a Superior Court of a writ of summons in the nature of a *quo warranto*, under R. S. O. c. 174, sec. 179, had power afterwards to set aside his fiat for the writ, with the writ and proceedings, for irregularity or insufficiency or whether the writ having been issued, his power was limited to trying the validity of the election impeached. The C. J. of the Q. B. refused to set aside the order. Now on appeal, Wilson, C. J., also held the County Court Judge had power to make the order, on the ground that the writ being made returnable before himself, he

had power to amend it, or to set it aside: and he held that the writ of *quo warranto* which is issued and is returnable before a County Court Judge is his commission in the sense that without such writ he has no authority to act, but not in the sense of the old writ of error, because in the former case the Judge gives himself authority to act. Osler, J. however, refused to recognize this distinction, and held that the order complained of was made wholly without jurisdiction; and Galt, J., being absent at the assizes, and the Court thus equally divided, the appeal dropped.

We have also before us the November numbers of the Law Reports, comprising the Table of Cases, and Index to 17 Chancery Div. now completed, and also from p. 1 to p. 299 of Vol. 18 Chancery Div., and p. 485 to 502 of 7 Queen's Bench Div. The last comprises only a single case, which is concerned with the interpretation of certain clauses and rules of the Income Tax Acts, and does not require notice here. The review of the above mentioned portion of Vol. 18, Chancery Div., will be contained in our next number.

THE RIGHT TO REMOVE COUNTY COURT JUDGES.

[COMMUNICATED.]

As conflicting views on this subject have lately found expression in the leading journals of the Province, it may not be out of place to mention some of the arguments on one side of the discussion.

The British North America Act gives to the Governor-General the right to appoint the judges of County Courts, but is silent as to their removal. The Legislature of Ontario has assumed the right to make laws concerning what is thus omitted. At the Confederation, and for some time afterwards, the law on this matter, as far as it was contained in the statutes, was well understood and had been settled for several years. The statutes which were in force respecting the office in question, when the consolidation took place in 1859, were then continued and remained intact up to the passing of the Confederation Act. The tenure was described in Con-Stat. U. C. cap. 15, sec. 3, which enacts that these judges "shall hold their offices during good behaviour, but shall be subject to removal by the Governor for inability or misbehaviour, in case such inability or misbehaviour be established to the satisfaction of the Court of Impeachment for the trial of charges preferred against judges of County Courts." The constitution of the Court of Impeachment and its duties are given in Con. Stat. U. C. cap. 14.

The first attempt to change this state of the law for Ontario took place in 1869, when the Local Legislature passed the statute, 22 Vict., cap. 22, to the effect that County Court Judges should hold office *during pleasure*, subject to removal by a tribunal there named. This was amended at the following session by Ont. 32 Vict., cap. 12 which repealed the Act last mentioned, and declared that "The judges of the several County Courts . . . shall hold their offices during good behaviour, but shall be subject to removal by the Lieutenant-Governor for inability, incapacity or misbehaviour, established to the satisfaction of the Lieutenant-Governor in Council, anything in the Interpretation Act or any other Act to the contrary notwithstanding." This is substantially repeated in the Revised Statutes of Ontario cap. 42, sec. 2, and has not since been altered.

This legislation by Ontario covers two distinct matters affecting the continuance in office of a County Court Judge, the one, the terms, the nature of the tenure, and the other, the means of deciding whether he has failed to fulfil these terms. In other words if we treat the judgeship as a subject of contract between the Crown and the tenant, the Provincial Legislature assumes to pre-

scribe the conditions on which the judge may keep his office and also to create the tribunal which shall decide finally whether the conditions have been complied with.

The difference between the nature of the tenure mentioned in the Con. Stat. and in the Revised Statutes is indicated by the presence in the latter of the word "incapacity" in addition to "inability" and "misbehaviour," which in the former appeared as the only grounds upon which, or either of which, a judge could be removed. This addition suggests that "inability" and "incapacity" are not to be treated as synonymous terms, and it is possible that one might be held to apply to physical, the other to mental qualifications. However that may be, I do not propose at present to discuss the right to legislate upon the terms of holding; but that this must share the fate of the right to remove. Granting, therefore, for the purposes of the present occasion, that the Local Legislature may as part of the organization of a court, or on some other ground, prescribe the nature of the tenure, I deal only with cases in which the occupant of the office ought to be removed. And I take the question now open to debate to be this—*Has a Provincial Legislature the right to direct the proceedings by which a County Court Judge may be removed?*

As far as I have heard the arguments in favour of the provincial right, they are covered by the following propositions:

(1.) That the constitution, maintenance, and organization of these courts is by the B. N. A. Act committed exclusively to the local power.

(2.) That it is necessary in the constitution, maintenance and organization of a Court to provide for both the appointment and removal of its judges.

(3.) That, as the said Act names nothing more than the appointment as being under the Dominion authority, everything else connected with the constitution, maintenance and organization, including the removal of the judge, must be thereby put within the control of the Provincial Legislature, the more especially because under the same heading "The Judicature," it is deemed expedient in that Act to provide both for filling and vacating judgeships in superior Courts, but only for the filling of them in inferior Courts.

There may be other arguments on the same side which some persons would urge instead of or in addition to these, but I think there is a two fold answer to them all:—

(1.) The silence in the B. N. A. Act as to this right of removal has the effect of giving it to the Dominion.

(2.) The language of the Act itself shows that Local Legislatures are not to deal with the removal of a judge.

This silence must be considered in the abstract, and in connection with the above mentioned special circumstance which accompanies it. As to silence generally, I submit that where there is no law to the contrary, the right to remove is appurtenant to the right to appoint. Any other rule would amount to a preference for anomalies and confusion in the affairs of state. If these rights rested with different bodies a deadlock might be created by the removing authority vacating the office as often as it might be filled—or the removing authority might from time to time open the place till it came to be filled by an occupant to its own liking, "which is absurd." Public policy furnishes a canon of construction by which a statute giving the power of appointment to a specified body without mentioning removal must be held to mean that the same body can place and displace.

Then as to the special circumstance that the means of removal of a County Court Judge is not stated, though the Act deals with the judicature of both courts, and provides for the removal from the higher tribunal: that circumstance is entirely consistent with the theory that silence on the subject gives the right to remove as part of the right to to appoint. In fact it is because this would

be the result of silence that the Act is not silent as to Superior Courts. It does not intend that the Governor-General shall in respect to those tribunals remove as well as appoint—neither does it intend to leave it in the power of the Dominion Legislature at any time to so ordain; consequently it is enacted that an address from the Senate and the House of Commons shall precede the dismissal of a superior court judge. This, from the date of the Confederation, not only takes the statutory power of removal from the Governor-General, but it puts interference with the tenure beyond the reach of Dominion Legislation. The address from the Houses of Parliament as a condition precedent to the removal of a judge from any superior court in Canada becomes a part of the law of the Empire. There was no intention so to circumscribe the authority of the Dominion over the removal of County Court Judges; therefore, and for that reason only, the statute is silent on the subject.

In the next place as to the contention that the wording of the Act shows that the Local Legislatures have no such rights as they assume. Sec. 91 gives to the Dominion Legislature the right to make laws "in relation to all matters not coming within the class of subjects by this Act assigned exclusively to the Legislatures of the Provinces." Sec. 92 enacts that "In each Province the Legislature may exclusively make laws in relation to * * * [sub-sec. 14] the administration of justice in the Province, including the constitution, maintenance and organization of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in these courts."

By sec. 96. "The Governor-General shall appoint the judges of the Superior, Districts and County Courts in each Province, excepting those of the Courts of Probate in Nova Scotia and New Brunswick."

By sec. 99. "The judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor-General on the address of the Senate and House of Commons."

This language as a whole shows that the Imperial Legislature must have intended and adjudged that for the purposes of the B.N.A. Act, neither the appointment nor the removal of a judge was any part of the constitution, maintenance or organization of the court, for, in the face of the fact that it assigns all authority on such appointment and removal, at all events as far as Provincial Superior Courts are concerned, to the Dominion authorities, it notwithstanding awards without any exception or qualification the constitution, maintenance and organization of *the same Courts* to the Local Legislatures. This is saying in effect that there is no necessity to make any exception, because they are distinct, and different matters. In order to make the Confederation Act consistent and effective on this subject, there is, therefore, no escape from the interpretation that neither the appointment nor the removal of a judge is any part of the constitution, maintenance or organization of the Courts assigned to the Provincial Legislatures.

There are some matters connected with the Court of Impeachment which add strength to the general bearing of my argument. That tribunal which at the time of the Confederation protected County Court Judges from the bare will of the Crown, answering to some extent the same purpose as the Houses of Parliment in the case of Superior Court Judges, was then composed of the Chiefs of the Courts of Queen's Bench, Chancery and Common Pleas, all of them, by the B. N. A. Act, to be thenceforward Dominion officials, who could only be removed as aforesaid after an address from the Senate and the House of Commons. Behind such a shield, the independence of a County Court Judge was far away from the blows of Provincial politics or local excitement, and even the Governor, the appointing power, could not call it into play until he had on his official responsibility first

investigated the accusations and had found them "sufficiently sustained and of sufficient moment to require judicial investigation." This as an instrument of public good is likely to be much more effective than any Court which could be formed entirely of provincial officials. I speak of this tribunal in the present tense because I do not believe it to be merely a thing of the past. If my arguments are sound, it follows that it has not been destroyed by the local legislation to which I have alluded. However, all that can be said of the Court of Impeachment does but beg the question, for, assuming that it met the requirements of the Imperial Legislature, and was therefore not disturbed at Confederation, that fact would not solve the problem. What authority can to-day make or unmake a Court of Impeachment? I do not rely, therefore, on the existence of this court as a positive answer to the right claimed by Ontario to make laws concerning the removal of a County Court Judge, but I do submit that the substance of the British North America Act shows this Province to have no such right, and as a consequence that the portion of the Revised Statutes which purports to deal with this subject is a dead letter.

Mr. Todd's valuable article on "Complaints against the Judiciary," published in this journal, (*ante* p. 400), certainly throws a strong light on a broad matter of which I touch but a part. However, neither in this communication, nor in the last chapter of his celebrated work on "Parliamentary Government in England," where he treats still more extensively of "The Judges in relation to the Crown and to Parliament," does he seem to lead away from the conclusion which I am pointing out as the proper one to arrive at concerning the authority of one of the confederated provinces of Canada in regard to the subject here discussed. From these, his writings, I extract this as a cardinal principle—the enjoyment of his office by a judge, may not be effectually interrupted, unless it be done at or near the fountain head from which that honour flows.

The first statute of Ontario alluded to by our valued contributor in the above article, stated the tenure of a County Court Judge to be during pleasure, removable for specified causes established to the satisfaction of the Lieutenant-Governor in Council.

Soon after it was published it became an open secret that the Dominion Government objected to its becoming law, and that disallowance was averted only by an understanding that it should be altered in the ensuing session. We see that it was accordingly altered by making the tenure during good behaviour, but subject to removal by the Lieutenant-Governor under certain circumstances without the intervention of the Court of Impeachment.

The fact that this Act (the one which our correspondent attacks in its revised shape) was not so interfered with might seem to suggest that it was free from all the objectionable features of the first one. There may, however, be a better explanation than this for the difference in the attitude of the Dominion Government on the two occasions, if we accept the conclusion of the writer that the amended Act was also invalid.

A report of the Minister of Justice in June, 1868, submitted rules for adoption concerning the review of provincial legislation. These were adopted by the Governor-General in Council. Mr. Todd, in his able work on "Parliamentary Government in the British Colonies," page 361, thus summarizes two possible grounds of objection noticed in that report.

(1.) "Where exception might be urged to the law itself as being in excess of the constitutional powers of the Local Legislature or at variance with Dominion legislation." (2.) "Where it might appear that proposed enactments were contrary to the policy which in the opinion of the Governor-General in Coun-

cil ought to prevail throughout the Dominion in view of the general interests thereof."

For nearly two centuries the policy of England has been to secure the independence of her judges as far as it could be accomplished by making their office "during good behaviour," and a similar view prevailed in the Province of Canada before Confederation. We may well believe therefore, that the first of the above mentioned statutes proposed a policy opposed to that "which in the opinion of the Governor-General in Council ought to prevail throughout the Dominion," thus coming within the second objection above formulated, one which Courts could not entertain, for they have no "view" over the general interests of the Dominion.

The central government could not avoid the responsibility of challenging the dangerous step, and there was in fact no alternative but disallowance, or an arrangement for repeal. But it may be argued that the Act of the ensuing session, after discarding the "during pleasure" clause, was open only to such objections as Courts would deal with, and therefore left to its doom before the judicial tribunals of the country.

The Court of Impeachment was originally composed of "the Chief Justice of Upper Canada, the Chancellor of Upper Canada and the Chief Justice of the Court of Common Pleas." Since that time the Court of appeal for Ontario has been established, and its chief bears the title of "the Chief Justice of Ontario." (J. A. sec. 4.) Whether the change thus and in other respects made in the titles of some of the judges who were *ex officio* members of the Court of Impeachment will necessitate legislation before it can perform its functions, may be open to argument

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We are requested to announce that the library at Osgoode Hall will be open every evening (except during Christmas vacation) from 7.30 to 10 p. m., until 1st March next.

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT.

NOVEMBER SESSIONS.

ONTARIO APPEALS.

MERCER (Appellant) v. THE ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO (Respondent).

Escheat—Hereditary revenue—B. N. A. Act—Secs. 102 *and* 109.

It appeared from the statement of the case agreed upon by the parties that this was an action brought by the Attorney-General for the Province of Ontario to recover from the defendants the possession of a certain parcel of land in the City of Toronto, being part of the real estate of one Andrew Mercer, who died *intestate* and without leaving any heirs or next of kin, on the 10th June, 1871; and whose real estate, it was alleged, escheated to the Crown for the benefit of the Province of Ontario. Andrew Mercer at the time of his death was seized of the land in fee simple in possession. The action was commenced in the Court of Chancery by the filing of an information on the 28th September, 1878. The information was amended on the 23rd November, 1879, under order dated 21st November, 1878. The defendant, Andrew F. Mercer, demurred to the said information for want of equity, and his demurrer was filed on the 22nd November, 1878. On the 18th November the demurrer was argued before PROUDFOOT, V.C. On the 7th January, 1879, the learned judge made an order overruling the said demurrer.

From this decision the defendant, Andrew G. Mercer, appealed to the Court of Appeal. The appeal was argued on the 23rd of May, 1879.

On the 27th of March, 1880, the said Court of Appeal affirmed the order overruling the said demurrer and dismissed the appeal with costs. Against this judgment and order of the Court of Appeal, the defendant, Andrew F Mercer, appealed to the Supreme Court. The parties agree that the appeal should be limited

to the broad question as to whether the Government of Canada or of the Province, is entitled to estates escheated to the Crown for want of heirs.

Held [Sir. W. J. RITCHIE, C. J. and STRONG, J., dissenting] that escheat being a prerogative right and hereditary revenue of the Crown in Canada, the Province of Ontario does not represent Her Majesty in the exercise of her royal prerogative in matters of escheat in said Province.

Held also (per FOURNIER, TASCHEREAU and GWYNNE, J. J.) that any revenue derived from escheats, after the full and free exercise of the Crown prerogative of grace and bounty in favour of any person having claims upon the person whose estate the escheated property was, belongs under section 102 B. N. A. Act, to the Consolidated Revenue Fund of Canada.

W. McDougall, Q. C., and *Z. Lash*, Q. C., for appellants.

Ed. Blake, Q. C., *Loranger*, Q. C., and *James Bethune*, Q. C., for respondents.

CORBY ET AL, (Appellants), v. WILLIAMS, (Respondent).

Contract—Vendor and purchaser—Property in goods—Delivery.

This was a bill filed in the Court of Chancery to recover a portion of the amount of a bill of exchange drawn by the respondent on the appellants, and accepted by them in payment of a cargo of corn purchased and shipped by the respondent, a commission merchant residing in Toledo, Ohio, on the order and for account of appellants, distillers at Belleville, Ont. Upon the arrival at Belleville of the cargo, between the dates of the acceptance and maturity of the draft, the defendants refused to receive it and afterwards to pay the said draft, alleging the corn to be useless and heated. The respondent sold it for the best price he could obtain, gave credit for the proceeds to appellants on account of their said acceptance, and sued appellants for the balance and interest.

The appellants contended that the respondent was bound by his contract to deliver the corn in good order at Belleville. It was proved the corn was shipped in good condition at Toledo, and that its deterioration took place *in transitu* and before the arrival of the cargo at Belleville. The respondents assigned the bill of lading, together with the policy of insurance, to the National Bank, Toledo, and drew through them at ten days upon the appellants, endorsing at the same time the bill of exchange for the purpose of vesting the property in the corn, in the Bank to hold to their use, until the bill of exchange should be paid and in default of payment to sell to reimburse themselves to the amount of the bill of exchange.

Held, (STRONG, J., dissenting) that the property in the corn remained by the act of the respondent in himself and his assignees, the Bank, until and after the arrival of the corn at Belleville, and the damage of the corn having occurred while the property continued to be in the respondent and his assignees, the appellants should not bear the loss.

W. Cassels, for appellants.

James Bethune, Q. C., for respondent.

QUEBEC APPEALS.

F. X. COTE (Appellant), v. STADACONA INS. COMPANY, (Respondents).

Company—Action for calls—Misrepresentation—Repudiation—Acquiescence by receipt of dividend.

In an action to recover the 3rd, 4th, 5th and 6th calls of five per cent. on fifty shares of one hundred dollars, alleged to have been subscribed by the appellant in the capital stock of the respondent Company, the appellant by his pleas denied that he ever subscribed for more than five shares, which were fully paid up shares, and alleged that after he had ascertained that he might be held to have only paid ten per cent. on fifty shares, he at once complained to the principal agents of the Company, and asked that his subscription be paid down at the amount he had in reality meant them to be, and that he believed he would never have anything more to pay on his shares; the pleas also averred misrepresentations and fraud on the part of respondent's agent. The Company was incorporated in 1874, and at the trial it was proved that the appellant's subscription was obtained through one of the local agents, who received a commission on the shares subscribed, and that

the appellant did not know the extent or responsibilities which he assumed, and that the amount set down in the subscription list was entered by the agent without appellant's knowledge or consent. At the end of the year 1875 the Company declared a dividend of 10 per cent. on the paid-up capital, and appellant received a cheque for $50, being a dividend of 10 per cent. on the amount paid "*montant verse.*" In the following year the Company suffered heavy losses, and appellant again endeavoured to be relieved from further liability without success, and calls having been made, he refused to pay.

Held, That the defendant immediately after setting his name to the subscription book, communicated to the respondents the true state of the case, and before any action had been taken by the Company upon the faith of the appellant's signature having been obtained, there was no completed contract entered into between them for fifty shares, and that appellant was not estopped by anything which took place afterwards from showing that he was never in fact holder of fifty shares in the capital stock of the Company.

Languedoc, for appellant.

Bedard, for respondents.

MANITOBA APPEALS.

WOOD (respondent) v. SCHULTZ (appellant).

Vendor and Purchaser. — Fraud — Supreme Court Amendment Act, 1879, *Sec.* 6.

The plaintiff charged fraud against the defendant in respect of a sale of a lot of land to him in Winnipeg. The defendant, being unable to be present at the hearing, applied for a postponement on the grounds that he was a material witness on his own behalf, and that it was not safe for him in his state of health to travel from Ottawa to Winnipeg.

Mr Justice Dubuc refused the postponement, and made a decree in favour of the plaintiff, directing an account to be taken. The Chief Justice of the Supreme Court, under sec. 6 of the Supreme Court Amendment Act of 1879, allowed an appeal direct to the Supreme Court, it being known that there were then only two judges on the bench in Manitoba, the plaintiff and Mr. Justice Dubuc, from whose decree the appeal was sought.

Held (*per* Chief Justice) that the cause was forced to a hearing with unjustifiable haste, and was conducted with such irregularity as would justify this Court in holding that there was a mis-trial, and in sending it back to the Court below. But he considered this unnecessary, as he was of opinion that the plaintiff had failed to establish his case, and that the appeal should be allowed with costs, and the bill dismissed with costs. STRONG, J., was of the same opinion as to the manner in which the case should be dealt with. FOURNIER and HENRY, J. J., were of opinion that the appellant should have been granted a postponement of the hearing, and that the appeal should be allowed with costs, and the appeal remitted to the position it occupied before the hearing GWYNNE, J., was of the opinion that the appeal should be allowed with costs, and the bill dismissed with costs. The appeal was allowed with costs, and the bill dismissed with costs.

Jas. Bethune, Q.C., for appellant.

J. A. Boyd, Q.C., for respondent.

CHANCERY.

Proudfoot, J.] [Nov. 16.

RE DONOVAN—WILSON v. BEATTY.

Administrator ad litem—Suits improvidently instituted—Solicitor of administrator ad litem—Costs paid to solicitor—Order to refund costs improperly paid—Res judicata—Sureties of administrator ad litem.

An administrator *ad litem* had allowed suits to be brought in his name without the sanction of the Court, and which both he and his solicitor had been notified was necessary, and a sum of $2,738.37 for costs in respect of such suits had been paid out of the funds to the solicitor, and which, it was alleged, had been so paid improvidently ; the Court in a suit by the executors' against the administrator directed a taxation of the solicitor's bill, when a sum of $2,012.81 was disallowed, and thereupon the sureties for the administrator, who was unable

to pay, applied by petition on an order that the solicitor should repay this amount with costs.

The Court [PROUDFOOT, J.] under the circumstances made the order asked, although no taxation of the costs as between the solicitor and his client had been had, and it was denied that any arrangement existed that the solicitor should only be paid such costs as the administrator might be allowed against the estate, that any privity existed between the solicitors and the executors, and a bill filed by the executors against the administrator and his solicitor had as against the latter been dismissed with costs on the ground of such want of privity, such dismissal, not having been on the merits, could not be claimed to be *res judicata*. *Crooks* v. *Crooks*, 1 Gr. 57, remarked upon and followed.

Proudfoot, J.] [Nov. 16.

BOARD OF EDUCATION OF NAPANEE v. MUNICIPAL CORPORATION OF NAPANEE.

School Trustees—Requisition for money to build school-house—Mandamus.

By the R.S.O., chap. 114, sec. 461, s. s. 6; ch. 204, s. 104, s.s. 10; and ch. 205, sec. 39, s.s. 4, 5, 6, 7, and secs. 29, 30, 31, a Municipal Corporation has not any discretion to accept or reject the requisition of school trustees for money to be expended in the purchase of a site for, and the construction of a public school; their duty is simply to comply therewith.

Where the Corporation refuses or neglects to comply with such a requisition they may apply to this Division of the High Court for a mandamus for the purpose of compelling the Corporation to provide the money. But in such a case the proper course it would seem is to proceed by a mandamus *nisi*, as the Corporation might be able to show that a mandamus absolute ought not to issue.

CHAMBERS.

Mr. Dalton.]] [November 20.

BANK OF HAMILTON v. BROWNLEE & CO.

Service—Partnership—Rule 40.

Brownlee, Brown and O. carried on business in partnership under the name of Brownlee & Co.; Brownlee absconded and the business continued some time when O assigned his interest to Brown.

Held, that the service of a writ against the firm, in the firm name, upon O., after the assignment to Brown, but before the same was made public, was regular.

Proudfoot, J.] [Oct. 10.

RE DEVITT.

Jurisdiction of Master in Chambers in part of subject matter—Confirmation of order as to part without—Rule 424—*Practice.*

A motion by petition for the sale of infants estate and for the application and distribution of the proceeds.

MR. STEPHENS made the order subject to confirmation by a judge in Chambers so far as it exceeded his jurisdiction. PROUDFOOT, J., confirmed the order, holding that the Official Referee in Chambers should continue to exercise the jurisdiction formerly vested in him in such matters, subject only to the confirmation of so much of his order as directed the distribution and payment out of Court of the moneys to be realized.

H. Cassels, for the applicant.

Proudfoot, J.] [Nov. 17.

DALE v. HALL.

Production—Rule 222.

See a full report of this case *post* p. 456.

Proudfoot, J.] [Nov. 18.

RE WILSON.

LLOYD v. TICHBOURNE.

Administration order—Right of infants.

This was an application for an administration of the estate of Daniel Wilson, deceased, by Mary Wilson, now Lloyd, his widow, and his seven infant children, by their next friend.

The testator died in 1876, leaving his property to his wife and children, as stated in his will, and appointed the defendant one of his executors.

The defendant is now the sole executor under the probate, and the debts of the testator ap-

peared to have been paid. The application was on the ground of the alleged misconduct of the executor.

PROUDFOOT, J., granted the order without going into the merits between the widow and the defendant the executor, on the ground that the infants, have a right to an administration order of an estate in which they are interested on the mere suggestion of their next friend that it would be for their benefit.

Costs reserved.

Langton, for the motion.

Hoyles, contra.

Proudfoot, J.] [Nov. 18.

BARKER v. LEESON.

Interpleader issue—County Court—Power of an issue directed from Superior Court.

An interpleader issue had been directed by the Court of Chancery to be tried at the sittings of a County Court. The plaintiff sent a jury notice and the trial was had accordingly, and a verdict returned for the plaintiff. The defendant took certain objections at the trials and afterward the County Court judge made absolute a rule to set aside the verdict and enter a non-suit.

Held, affirming the decision of the Master in Chambers, that the County Court judge had no power to set aside the verdict and enter a non-suit, because the grounds on which he did so embraced matters of law as well as matters of fact. The Court (PROUDFOOT, J.) desired to express no opinion as to whether in this case the County Court judge had power to reserve the question whether the evidence at the trial sufficed to establish the plaintiff's case.

Bain, for the appeal.

Reeve, contra.

Osler, J.] [November 12.

CLARKE v. CREIGHTON.

Costs—Taxation—Married woman—Retainer.

Plaintiff sued C. and G., of whom G. was a married woman, and obtained a verdict against both. In turn both defendants obtained a rule to enter a nonsuit for them or a verdict for G The latter part of the rule was made absolute. The taxing officer disallowed the plaintiff any costs in term because he had not aban doned his verdict against G., and taxed to her one half the costs of the term motion, both defendants having appeared by the same attorney.

Held, on appeal, that a proportion of the costs in term should be allowed to the plaintiff, and it was referred to the Master to enquire whether any binding contract of retainer had been entered into by G., and if not, that no costs other than disbursements should be allowed to her.

S. R. Clarke, for plaintiff.

N. Miller, for defendants.

Osler, J.] [Nov. 21.

IN RE MURDOCK, AN INFANT.

Habeas Corpus—Infant, custody of.

Where the father and mother of a female child under five years of age were living apart, the Court refused under the circumstances mentioned in the judgment to take the child out of the custody of the mother, but allowed the father to have access to the child at stated times.

S. H. Blake, Q. C., for mother.

Murphy, for father.

Osler, J.] [Nov. 1

HUGHES v. FIELD.

Attachment—Absconding debtor—Costs—Order ex parte.

M. obtained a judgment in the ordinary way against the defendant, who had absconded. Several writs of attachment against defendant, as an absconding debtor, were issued. H., one of the attaching creditors, but not the first one, obtained *ex parte* an order that the costs of all the writs of attachment should be paid out of defendant's assets before anything should be paid to the judgment creditor, although there was a fund not liable to the execution creditor, but which was available for the attaching creditors.

Held, that the order must be set aside with costs.

Held also, that under R. S. O. cap. 68, sec. 20, only the costs of suing out and executing the writ can be allowed.

An application to discharge an *ex parte* order

on the ground of suppression of facts, is not an appeal from that order.

Armour, for judgment creditor.

Miller, for attaching creditor.

Wilson, C. J.] [Nov. 24.

FRANCIS v. GRACEY.

In an application to dismiss the plaintiff's action under Rule 255, the six weeks mentioned in the rule may be made up of time that elapsed before, as well as since, the coming into force of the Judicature Act.

REPORTS.

RECENT ENGLISH PRACTICE CASES.

(Collected and prepared from the various Reports by A. H. F. LEFROY, ESQ.)*

FARROW v. AUSTIN.

Imp. J. A. 1873, *s.* 49, *O.* 55, *r.* 1—*Ont. J. A. s.* 32, *O.* 50, *r.* 1 (*No.* 428—*Appeal for Costs.*

[June 21, C. of A.—L. R. 18 Ch. D. 58, 45 L. T. N. S. 227.

This was a suit for administration of the trusts of a will. On further consideration MALINS, V. C. made an order refusing the plaintiff, a married woman, who was a residuary legatee, and one of the executors under the will, any costs of the suit, and ordering the next friend to pay the costs of taking an account of what, if anything, was due from another of the executors on an account current between him and the testator.

The plaintiff appealed.

The preliminary objection was taken that this was an appeal for costs only.

JESSEL, M. R.—According to the rules acted upon by Courts of Equity prior to the Judicature Act, a residuary legatee filing a bill for administration was entitled to costs out of the estate unless some special grounds were shown for depriving him of them; and if he was also a personal representative, his *prima facie* claim to costs out of the estate was all the stronger. This right is expressly saved by rule 55 (Ont. O. 50). The appellant has a *prima facie* right to costs out of the estate which can only be defeated by shewing some special grounds, and I consider that her costs do not come within the description of costs which are in the discretion of the Court.

BAGGALLAY and LUSH, L. JJ., concurred.

NOTE.—*Imp. J. A.* 1873, *s.* 49, *O.* 55, *r.* 1, *and Ont. J. A. s.* 32, *O. No.* 428, *are identical, respectively.*

BEDDALL v. MAITLAND.

Imp. O. 19, *r.* 3. *Ont. O.* 15, *r.* 3 (*No.* 127).

Pleading—Counter-claim.

A counter-claim may be brought in respect of a cause of action arising after the issue of the suit in the original action.

[Feb. 24, Ch. D.—50 L. J. N. S. 401, L. R. 17 Ch. D. 174.

In this action, part of the wrongful act alleged by the defendant's counter-claim, for which he claimed damages, consisted of forcible ejectment at a date subsequent to the issue of the writ.

Counsel for plaintiff took an exception to jurisdiction as regarded the counter-claim, on grounds indicated in above head-note, and cited *The Original Hartlepool Collieries Co.* v. *Gibb*, L. R. 5 Ch. D. 713; *Vavasseur* v. *Krupp*, L. R, 15 Ch. D. 474; *Stooke* v. *Taylor*, L. R. 5 Q. B. D. 569; *Winterfield* v. *Bradnum*, 47 L. J. Q. B. 270. Counsel for defendant, *contra*, contended that a counter-claim was in the nature of a fresh action, and relief could be given upon it in respect of any cause of action accrued before the counter-claim was put in, and cited *Child* v. *Stenning*, L. R. 7 Ch. D. 413; 11 Ch. D. 82; *Fritz* v. *Hobson*, L. R. 14 Ch. D. 542; *Chatfield* v. *Sedgwick*, L. R. 4, C. P. D. 459; *Neale* v. *Clarke*, L. R. 4 Ed. D. 286.

FRY, J., after remarking that he had a strong opinion on the subject, and regretting that it differed from that of the M. R. in *The Original Hartlepool Co.* v. *Gibb*, *supra*, and after citing Imp. J. A. 1873, sec. 25, sub-sec. 3 (Ont. J. A., sec. 16, sub-sec. 4), and observing on the generality of its terms, turned to the rules and forms

* It is the desire of the compiler to make the above collection of cases a complete series of all current English decisions, illustrative of our new pleading and practice, under the Supreme Court Judicature Act,

of pleading. As to Imp. O. 19, r. 3, he observed :—"It is to my mind evident, then, that there is no intention to confine the claim made by the counter-claimant to damages, or to an action of the same nature as the original action ; and therefore, when it is said that the defendant may set up against the claims of the plaintiff a claim of his own, it does not mean necessarily that that is a claim *ejusdem generis*, because it says expressly 'whether such set off or counter-claim sound in damages or not.'"

He then referred to Imp. O. 20, (Ont. O. 16) whereby provision is made for enabling the defence to be brought down to a date later than the commencement of the action, and that, in his opinion, opposed as it was to that of the M. R., the rule introduces this liberty with regard to defence only, because the liberty already existed with regard to counter-claim by the statute. He then continued as follows :—

" I cannot help observing that the construction of M. R. appears to me to be open to this very serious objection, that it requires the defendan', who has separate cause of action beginning before and after the date of the original writ, to separate those causes of action ; the one which goes down to the date of the original writ he may ventilate by means of cross-claim ; in respect of the other he must issue an independent writ. Now, I think that the general spirit of the Jud. Acts is especially to prevent multiplicity of procedure, and to enable the parties to settle, as far as may be, by one hearing and one judgment, all questions in controversy between them."

He then referred, in confirmation of this view, to *Stooke* v. *Taylor*, supra ; *Winterfield* v. *Bradnum*, supra ; and the utterances of the judges therein ; and observed that in the light these authorities, the decision of the M. R. in *Vavasseur* v. *Krupp*, supra, which is very inconvenient, appears, to say the least, of doubtful correctness, finally expressing a hope that the matter would be carried to the Court of Appeal.

[NOTE.—*Imp. O.* 19, *r.* 3, *is identical with Ont. O.* 15, *r.* 3, *No.* 127.]

MORRIS V. RICHARDS.

Imp. O. 57, *r.* 3—*Ont. O.* 52, *r.* 4, (*No.* 457).

Action on promissory note barred, where limit of time under Statute of Limitations expired on a Sunday, and the writ was not issued till the following Monday, since above order was not intended to extend the time fixed by said Statute.

[March 11, Q. B. D.—45 L. T. N. S. 210.]

The above point came up on a question reserved at the Assizes by A. Wills, Q C., Commissioner.

In delivering judgment Mr. Commissioner Wills at first determined that the Statute of Limitation for bringing the action in question expired on June 13th, 1880, which was a Sunday. He then continued as follows :—" It is said that under O. 57, r. 3 (Ont. O. No. 457) the cause of action did nevertheless arise within six years of the commencement of the action. I am o opinion that this rule has no such application in this case. The " time for doing any act " in this rule refers to times limited by the practice of the Court for taking proceedings, and the effect of the rule is, that in the cases to which it is applicable, a proceeding which but for that enactment would not, if taken on Monday, be duly taken according to the practice of the Court, whether established by definite enactment or otherwise, shall nevertheless be held to be duly taken. It certainly was never intended that the provision should affect the Statute of Limitations. The writ in this case was ' duly issued' on the Monday without the protection of Order 57, r. 3, and there is nothing in the enactment to alter the actual date of the commencement of the action."

[NOTE.—*The Imp. and Ont. orders are identical.*]

DAVIES V. WILLIAMS.

Imp. J. Act 1873, *sec.* 90—*Ont. J. Act*, *sec.* 78.

Where an action has been transferred from a County Court into the High Court, the proceedings must thenceforth be regulated by the practice of the High Court. Hence, in an action for ejectment so transferred, discovery cannot be obtained before the delivery of a statement of claim.

[Dec. 17, 1879—45 L. T. N. S. 469.]

The point in question is indicated by the head-note, and came up on an application for

discovery made by the plaintiff, before filing any statement of claim, other than the plaint in the County Court from which the action was transferred.

BACON, V. C.—Whatever may be the practice of the County Courts, this Court, into which the action has been transferred, can only deal with the case according to its own practice. Courts know their own practice; they are not bound to know the practice of other Courts. The case has been transferred into this Court that justice may be administered between the parties, but this can only be according to the practice of the Court. That practice is founded on the most just and necessary reasons; and the order I am asked to make would be most oppressive. I do not yet know what are the matters in question between the parties, in respect of which I am called upon to give discovery; and until I do, I cannot accede to such an application as the present.

[NOTE.—*The section of the Imp. Act and that of the Ont. Act seem to be virtually identical.*]

CANADA REPORTS.

ONTARIO.

CHAMBERS.

(Reported by G. S. Holmested, Esq., Registrar of the Court of Chancery.)

DALE v. HALL.

Order for production—Time when plaintiff entitled to.

A plaintiff is entitled to an order for production on præcipe against any defendant whose time for putting in a statement of defence has expired, whether a statement of defence has been put in or not.

[Nov. 14, 15—PROUDFOOT J.

H. Cassels, for plaintiff, applied for a direction to the Clerk of Records and Writs to issue an order for production against the plaintiff under the following circumstances:

Plaintiff's statement of claim had been delivered, and the time for delivery of statement of defence had expired. A statement of defence had been delivered.

He stated that the Clerk of Records and Writs had, after consultation with FERGUSON, J. refused to issue the order on the ground that the pleadings were not closed. He contended that the plaintiff was not bound under Rule 222, to wait until the close of the pleadings, but was entitled to the order against each defendant as soon as the time for each defendant putting in a defence had expired, whether a defence had in fact been put in or not. This had been held to be the proper construction of Rule 222 by the Master in Chambers, in *Clarke* v. *Whiting*, on 24th October, 1881.*

Any other construction of the rule requires the introduction of words into the Rule which are not there. Either the time for putting in the statement of defence can expire when one has in fact been put in, or it cannot. To say that it cannot is manifestly absurd, and if it can, as is obviously the case, then the plaintiff is within the terms of the Rule and entitled to the order.

PROUDFOOT, J., was of opinion that the plaintiff was entitled to the order as claimed; but before disposing of the application desired to consult Ferguson, J.

Nov. 15th. 1881.

After consulting with my brother Ferguson, I am still of opinion (although he retains the opinion expressed by him) that the plaintiff is entitled to the order, and as my brother Ferguson has not given any decision in the matter which can be appealed from, I am bound to follow my own opinion. I may say that I find that there is considerable difference of opinion among the members of the High Court on this point, and it is therefore desirable that it should be without delay settled by an appeal to a Divisional Court.

* In this case *Isaac Campbell* applied on motion to set aside a statement of defence on the ground that an order for production had not been complied with.

A. Hoskin, Q. C., showed cause, contending that the order for production had been granted on præcipe, and was a nullity, as the pleadings were not closed as required by Rule 222.

It was on the other side, however, contended that the order on præcipe could be obtained as soon as defendant put in his statement of defence, and without formal pleadings.

THE MASTER held that the order was good and gave three days further time to produce on payment of costs.

LAW STUDENTS' DEPARTMENT.

RECENT EXAMINATIONS.

The following is the result of the recent examinations at Osgoode Hall:—

CALLS TOTHE BAR--R. S. Neville, E. V. Bodwell, W. C. Hamilton, E. A. Peck, G. W. Beynon, J. H. D. Munson, C. C. Going, F. F. Baines, and F. McDougall, (æq.); A. B. Cox, A. J. Sinclair, G. H. Muirhead, H. Yale, S. Wood, F. P. Graydon, J. Russell, and A. Stewart, (æq.); R. Cassidy, V. Chisholm, G. McLaurin, T. H. Bennett, F. A. Hilton, J. R. Dowlin, and G. H. Smith, A. McKay and W. Proudfoot, G. M. Lee, D. F. McWatt, H. B. Weller, N. Mills.

ATTORNEYS.—J. H. D. Munson, W. C. Hamilton, I. F. Hellmuth, J. L. Geddes, (without oral), E. A. Peck, F. M. McDougall, C. E. Irvine, Arch. Stewart, R. S. Neville, A. J. Sinclair, W. A. McDonald, J. Russell, A. Craddock, A. McKay, W. L. Palmer, G. W. Beynon, R. Cassidy, C. Widderfield, G. H. Muirhead, J. B. O'Brian, G. R. Sanderson, G. McLaurin, R. A. Pringle, J. Harrison, J. H. Ingersoll, J. R. Haney, D. F. McWatt, T. G. Rothwell, W. C. Penny, T. A. O'Rourke, S. G. McGill, V. Chisholm, R. Gilray.

FIRST INTERMEDIATE.—J. D. S. C. Robertson, (scholarship), J. A. Richardson, (scholarsnip), F. J. Palmer (scholarship), A. E. Grier, C. A. Grier (with honours and without oral) W. F. Allan, H. J. Wickham, G. Bolster, R. Christie, A. Carswell, E. L. Curry, W. S. Morphy, W. Cook, and W. A. Proudfoot (æq.); A. Sutherland, J. C. Grace, F. H. Phippen, F. L. Brooke, and A. E. Dixon (æq.); A. W. Morphy, J. McIntosh, W. G. McDonald, J. P. Lawless, H. Spence, H. J. Burdett, E. A. Wismer, James Miller, and W. M. Shoebottom (æq.); J. B. Chambers.

SECOND INTERMEDIATE.—C. L. Mahoney (scholarship), R. S. Cassels (scholarship), J. C. Delaney and A. Foy, (æq.); (scholarships), W. G. Wilson and G. F. Ruttan (with honours), F. W. A. Haultain, W. J. Wallace, D. M. Fraser, R. E. A. Laird, J. A. Culham (without oral), C. R. Irvine, H Canniff and B C. Murchison, (æq.); J. P. Fisher, J. J. O'Meara, C. S. Start, D. H. Tennant, H. C. Mack, J. A. Mulligan G. D. Douglas, J. A. Walker, J. W. Hammond, H. C. Hamilton, J. A. Palmer, F. W. Garvin, M. McDermott.

OBITUARY.

Arthur Holmested, Esq., formerly Clerk of Records and Writs of the Court of Chancery, died at his residence, in Toronto, on the 27th ult., in the 74th year of his age.

Mr. Holmested was born at Bocking, in the County of Essex, in 1808; the son of Mr. Thomas Holmested, a surgeon, a profession which his grandfather and great-grandfather had likewise practised in the same place. He studied law in England, and was admitted as an attorney of the English Courts, and for a short time practised his profession in London, England. He afterwards turned his attention, however, to other pursuits, and in 1857 emigrated to Canada and took up his abode in Toronto. In December, 1857, he obtained employment as a clerk in the Registrar's office of the Court of Chancery, and in 1868, when the Records and Writs department was separated from the other duties of the Registrar's office, he was appointed by the judges as the first Clerk of Records and Writs of the Court. This office he held until the autumn of 1880, when being incapacitated by a stroke of paralysis, he resigned his office. From this attack Mr. Holmested never fully rallied, but though his mind suffered from a temporary cloud, he gradually recovered his faculties of speech and memory which he retained until within a few moments of his end. He leaves a widow and five sons and three daughters. His son, Mr. G. S. Holmested, is now the efficient Registrar of the Court of Chancery.

Mr Holmested was an excellent officer, and by his strict attention to his duties and courteous demeanour won the respect and confidence of all those with whom he came in contact.

LIST OF ARTICLES OF INTEREST IN CO-TEMPORARY JOURNALS.

Crimes against the elective franchise.—*Crim. Law Rev.*, July, 1881.

Judicial problems relating to the disposal of insane criminals.—*Ib.*, Sept, *et seq.*

Misconduct of juries —*Southern Law Rev.*, Oct., 1881.

Title from fraudulent vendors of chattels.—*Ib.*

Liability of servants for negligent injury to co-servant.—*Irish L. J.*, Sept. 24., *et seq.*

Negotiable note signed by public agent —*Albany L. J.*, Oct. 22.

State Legislation and charity organization.—*Ib.*, Oct. 29.

Street railroads—their origin, organization, compensation, location, and liabilities.—*Ib.*, Nov. 5.

Contracts for sale under Lord Cairns' Conveyancing Act.—*London L. J.*, Oct 15, 22.

Challenge to the array.—*Am. Law Rev.*, Nov.

Insanity as a defence.—*Ib.*

The law of domicile in connection with the right of succession to both personal and real estate.—*Am. Law Reg.*, Nov.

The law of bicycles and tricycles.—*London L. J.*, Oct 29.

D rmant partners —*Central L. J.*, Nov. 11.

Imputed negligence.—*Ib.*, Nov. 18.

Law Society of Upper Canada.

OSGOODE HALL.

TRINITY TERM. 45TH VICT.

During this Term the following gentlemen were called to the degree of Barrister-at-Law. The names are placed in the order of merit:—

CALLED WITH HONOURS.

John Henry Mayne Campbell.

CALLED.

George Anthony Watson, John Sanders Macbeth, Horace Edgar Crawford, George Gordon Mills, Jeffrey Agar McCarthy, Charles Miller, Allan McNab, James Scott, Conrad Bitzer, William Elliott Macara, Samuel George McKay, James Brock O'Brian, Frederick Herbert Thompson, Frederick William Kittermaster, Alexander Ford, James Walter Curry, Edward Norman Lewis, Frederick Case, Abraham Nelles Duncombe, William Franklin Morphy.

The following gentlemen who passed their examination in Easter Term, 1881, were also called to the Bar this Term:—

Frederick Faber Harper, Solomon George McGill.

The following gentlemen were admitted into the Society as Students-at-Law, namely:—

GRADUATES.

Hugh St. Quentin Cayley, William Durie Gwynne, Thomas Chalmers Milligan, Alpin Morrison Walton, Douglas Armour, Thomas B. Bunting, Walter Laidlaw, Thomas Joseph Blain, George Washington Field, Samuel Clement Smoke, Henry Herbert Collier, Frederick W. Hill, Charles William Lasby, John Bell Jackson, James Metcalf McCallum, Thomas Edward Williams, George Morton, Frederick Ernest Nellis, Alexander Cameron Rutherford, Frank Henry Keefer, Lucius Quincy Coleman, Henry Thomas Thibley, Joseph Wesley St. John, John Douglas.

MATRICULANTS OF UNIVERSITIES.

Edward W. Hume Blake, Herbert Carlton Parks, Edward Charles Higgins, William H. Holmes, R. S. Smith, John Wesley White, John Paul Eastwood.

JUNIOR CLASS.

William Murray Douglas, George Marshall Bourinot, Thomas Urquhart, Alexander William Marquis, John Bell Dalzell, Osric L. Lewis, Frederick Stone, Alexander David Hardy, Donald James Thomson, Joseph Coulson Judd, Parker Ellis, John O'Hearn, Francis McPhillips, Henry Clay, Robert Casimir Dickson, Arthur Clement Camp, John Carson, Douglas Harington Cole, Thomas Steele, Andrew Charles Halter, Matthew Joseph McCarron, Robert G. Fisher, Charles Meek, W. H F. Holmes, Paul Kingston, Harry George Tucker, Richard Vanstone.

And the Preliminary Examination for Articled Clerks was passed by William Mansfield Sinclair.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

Articled Clerks.

1881.
- Ovid, Fasti, B. I., vv. 1-300; or, Virgil, Æneid, B. II., vv. 1-317.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History—Queen Anne to George III.
- Modern Geography—N. America and Europe.
- Elements of Book-keeping.

In 1882, 1883, 1884 and 1885 Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same year.

Students-at-Law

CLASSICS.

1881.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero in Catilinam, II., III., IV.
- Ovid, Fasti, B. I., vv. 1-300.
- Virgil, Æneid, B. I., vv. 1-304.

1882.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum, (B. G. B. IV. c. 2 0-36, B. V., c. 8-23.)
- Cicero, Pro Archia.
- Virgil, Æneid, B. II., vv. 1-317.
- Ovid, Heroides, Epistles V. XIII.

1883.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum.
- Cicero, Pro Archia.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Heroides, Epistles V. XIII.

1884.
- Cicero, Cato Major.
- Virgil, Æneid, B. V., vv. 1-361
- Ovid, Fasti, B. I., vv. 1-300.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.

1885.
- Xenophon, Anabasis, B. V.
- Homer, Iliad. B. IV.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Ovid, Fasti, B. I., vv. 1-300.

Canada Law Journal.

VOL. XVII. DECEMBER 15, 1881. NO. 23.

DIARY FOR DECEMBER.

15. Thurs..Christmas vac. in Supreme Court and Exch. Ct. begin. Morrison, J., sworn in, Ct. of Appeal, 1877.
17. Sat..First Lower Canada Parliament met, 1792.
18. Sun..*4th Sunday in Advent.*
22. Thurs..Shortest day.
24. Sat..Court of Appeal and Chancery vacation begin.
25. Sun..*Christmas Day.*
26. Mon..U. C. made a Province, 1791.
27. Sjragge, V. C., appointed Chancellor, 1879. Municipal nominations.
31. Sat..Rev. Stat. of Ont. came into force, 1877.

TORONTO, DEC. 15, 1881.

WE understand that the Benchers have decided to take no action towards obtaining any protection to solicitors as against unlicensed conveyancers, at least in the direction of legislation; the reason being that it is said any action of that sort would provoke hostility, and result in harm rather than good to the complainants. We feel rather curious to know wherein the profession could be placed in a worse position than they are at present, unless indeed they were compelled to carry on lawsuits and do conveyancing for nothing, and pay something to clients for this privilege. As it is at present, the privilege they enjoy is to do such work as they would in any event do by reason of their legal education, or, in other words, the work which now exclusively comes to them to be done is only such work as cannot be done by outsiders by reason of their want of legal or technical knowledge. As to the country practitioners, ther privilege is to pay $20 per annum for certificates which are, to use a stage simile, a "screaming farce," and for several volumes of reports which are practically useless from lack of business, litigation—except in Division Courts—being almost *nil*, and conveyancing being in the hands of outsiders for reasons often referred to. The only course that occurs to us in the premises is to abolish the Law Society, sell Osgoode Hall to a "collection bureau," and emigrate to Manitoba, leaving the library to the "invaders," in the Parthian hope that confusion to the public might thereby become worse confounded.

OSGOODE HALL LIBRARY.

The opening of Osgoode Hall Library in the evening is no doubt a decided boon, and we trust we shall not be deemed ungrateful for small mercies if we still decline to rest and be thankful. Osgoode Hall contains a noble collection not only of strictly legal works, but of works on history, on abstract jurisprudence, on metaphysical and moral philosophy, and of *belles lettres*. It would, no doubt, be out of the question to permit those legal text books and reports which are in every day use by practitioners to be taken away from the library and, as regards them, we are content; but we would say a word as to those other works, pertaining rather to general literature than to mere professional literature, which have been doomed to a more hopeless obscurity than ever in "the Bencher's room." Now many would gladly avail themselves of the collection of works of this kind, if a scheme were devised by which they might take them away for a limited period. We submit that to say that those who are so anxious to improve their minds as all that, can come in the evening, is scarcely an answer to this suggestion. We should not be content to give the minimum of help and encouragement to those

who aim at more philosophical and scientific culture, but rather should aid and assist them in every possible way. It is, an uncomfortable thing to start out after dinner and seek the dreary recesses of a large public library, the sight of which you have perhaps become heartily sick o for that day at least. We would earnestly appeal to the library commitee to consider whether a scheme could not be devised whereby, on giving proper security, members of the profession in Toronto should be able to avail themselves more conveniently of that portion of the library which does not consist of works of strictly practical utility. We allude to the works of such writers as Bentham, Austin, Cornewall Lewis, J. S. Mill, and Henry Maine, and to the large collection of historical works and historical records which exist in the library, which our popular librarian is now forced to refuse permission to take away, although he may be well aware that the gentleman asking for them has been the only one who has asked for them for six months, and that he is not likely to be asked again for them for another period equally long. We may remark that the books in the Parliamentary library at Ottawa are obtainable in this way by members of Parliament, and by officers in the civil service.

RECENT DECISIONS.

We have now before us for review the cases reported in L. R. 18 Chancery Div. p. 1—299, being one of the November numbers of the Law Reports.

VENDOR AND PURCHASER—POLICY OF FIRE INSURANCE.

In the first case,—*Rayner* v. *Preston*—the point to be decided was a somewhat curious one. It was in effect as follows :—Where after the date of a contract for the sale of a house, but before the time fixed for completion the house is damaged by fire, is the purchaser entitled, as against the vendor, to the benefit of a policy of insurance previously effected by the vendor, although there is not in the contract any mention of the fact that the vendor had insured, or of the policy? Brett and Cotton, L.JJ., affirming Jessel, M.R. (L.R. 14 Ch. D. 297), and following a decision of Kindersley, V.C., in *Poole* v. *Adams*, 12 W.R. 683, held the purchaser was not entitled as against the vendor. James, L. J., dissented. Cotton, L. J., takes three points in his judgment: (1) that though the contract of sale passes all things belonging to the vendors, appurtenant to or necessarily connected with the use and enjoyment of the property mentioned in the contract, it does not pass collateral contracts, and such, at least independently of Imp. 14 Geo. III, c. 78, sec. 83, (which is intended to ensure the *bona fide* laying out of the proceeds of a policy of fire insurance in the rebuilding of the premises burnt) is a policy of insurance; (2) that, even if under Imp. 14, Geo. III, c. 78, the purchasers could have insisted on the proceeds of the policy being applied in rebuilding, the Act only gives a right to insist on the money being so applied, and their claim to have this done is the foundation of and essential to the existence of their right to the money; (3) that an unpaid vendor is a trustee for the purchaser in a qualified sense only,—he is so only in respect of the property to be sold, of which the policy is not a part. The money for the insurance is received by or in respect of the contract of insurance,—it is fallacious to say that it is received in respect of property which is trust property, by reason of the vendor's legal interest in the property. He also observes that, while in his opinion there was no decision in favour of the appellants, there was *Poole* v. *Adams*, supra, directly against them, —and remarks incidentally, p. 7, that the plaintiffs were not entitled, as against the defendants, to rely on a statement of opinion made by the solicitor of the defendants as to the legal rights of the parties. Brett, L.J., distinguishes between the subject matter of

insurance, and the subject matter of the contract of insurance, and shows that, whereas there did exist a relation between the plaintiff and the defendant with regard to the first, viz., the premises insured, there never was any relation of any kind between them so far as regards the second, which is in all cases money, and money only. "Any valuation of the policy, any consideration of increase of the price of the premises in consequence of there being a policy, was wholly omitted. There was nothing given by the plaintiffs to the defendants for the contract. The contract, therefore, neither expressly nor impliedly, was assigned to the plaintiffs; and, so far as regards the contract of insurance, there never was any relation of any kind between the plaintiffs and the defendants." On the other hand it is wrong to describe the relation which existed as to the *subject matter* of the insurance, as being one of trustee and cestui que trust. It is not a true description between the parties to say "that from the time of the making of the contract, or at any time, one is ever trustee for the other. They are only parties to a contract of sale and purchase, of which a Court of Equity will, under certain circumstances, decree a specific performance." But he adds, p. 11, "even if the vendor was a trustee, the contract of insurance does not run with the land, but as a mere personal contract; and unless it is assigned no suit or action can be maintained upon it except between the original parties to it," and he compares the settled law as to marine policies, namely, that no interest under the policy passes unless it is made part of the contract purchase and sale of the subject matter of insurance, so that it would be considered in a Court of Equity as assigned. The dissenting opinion of James, L. J., seems to have arisen from his divergence from his colleagues on two points, viz., in holding (1) that the relation between the parties was truly and strictly that of trustee and *cestui que trust*, for "when the contract is performed by actual conveyance, or performed in everything but the mere formal act of sealing the engrossed deed, then that completion relates back to the contract, and it is thereby ascertained that the relation was throughout that of trustee and *cestui que trust*," though, while the contract is *in fieri*, "it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is *in fieri*;" (2) a policy of *fire* insurance is not a mere collateral contract, but the trustee (the vendor) received the insurance money by reason of and as the actual amount of the damage done to the trust property. It may be observed that he does not cite authority as to his rendering of the law on the first point.

WILLS—INCONSISTENCY—EVIDENCE.

Of the next case, *in re Bywater*, it seems merely necessary to observe (1) that it was held, on appeal from the M. R., that the part of the will, construction of which was desired, was not a case of two inconsistent gifts, in which case the latter clause would prevail, if the Judge could find nothing else to assist him in determining the question, but of a gift of something to arrive at a future time with a subsequent direction as to the time of payment which was inconsistent with the terms of the original gift, and that such subsequent direction could not enlarge the gift, but must be rejected as inconsistent with it; (2) that it was held impossible to allow evidence to be adduced that the latter of the two clauses was inserted by a mistake in copying the altered draft of the will, and in opposition to the testator's direction (cf. Williams on Ex., Ed. 7, Vol. 1, p. 357; *re Duane*, 31 L. J. (P. & M.) 173).

BILLS OF SALE—USAGE—DISCOVERY.

We need not dwell on the next case, *Crawcour* v. *Salter*, so far as it is concerned with the bankruptcy law, but there are three points which came up in it, which it seems well to notice here, viz., (1) the plaintiff hav-

ing lent furniture on hire to the defendants, to be paid for by instalments—the property to remain in him till all instalments were paid—but then to pass to the defendants, this hiring agreement was held not to operate as a bill of sale, just as similar agreements with regard to pianos (*Stevenson* v. *Rice*, 24 C. P. 245; *Mason* v. *Johnson*, 27 C. P. 208; *Mason* v. *Bickle*, 2 App. 291,) or with regard to the sale of safes (*Walker* v. *Hyman*, 1 App. 545) have, in our own courts, been held not to pass the property, so as to come under the Chattel Mortgage Act (R. S. O., 119); (2) the Court of Appeal unanimously declare that the custom of hotel-keepers holding their furniture on hire is now so well established in England that it ought to be taken judicial notice of; (3) it was held by Malins, V. C., p. 36, that a client is not privileged to prevent his solicitor, on the ground of a breach of professional confidence, from giving evidence as to what persons were present at the time of the execution of the deed, which he was employed to have executed, and to which he was one of the witnesses, on the principle laid down by Lord Ellenborough in *Robson* v. *Kemp*, 5 Esp. 52, that if an attorney puts his name to an instrument as a witness he makes himself thereby a public man, and no longer clothed with the character of an attorney.

The next two cases, *Beckett* v. *Attwood* and *Farrow* v. *Austin*, concern points of practice, and have already been noted among our Recent English Practice Cases in former issues.

WILLS—CONDITIONAL GIFT.

In re Brown's Will, p. 61, a testator appointed his wife sole guardian of his daughters, to whom he bequeathed certain legacies contingent on their attaining twenty-one or marrying with the consent "*of their guardian or guardians.*" After the death of the wife, a daughter married under twenty-one without the consent of any guardian or guardians there being none, and died shortly afterwards under the age of twenty-one years. It was held by Fry, J., and by the C. of A. that the condition was not complied with, and that the daughter took no vested interest in the legacies—the condition not being inoperative by there being no guardians, since guardians could have been appointed by the Court, and the testator, on the language of his will, must be taken to have contemplated such an appointment. And a distinction is drawn both by Fry, J., and by the C. of A., between this case, and such a case as *Dawson* v. *Oliver-Massey*, L. R. 2 Ch. D. 753, which fell under the rule laid down by Story, J.—Eq. Jur. sec. 291—that "where a literal compliance with the condition becomes impossible *from unavoidable circumstances and without any default of the party*, it is sufficient that it is complied with as nearly as it practically can be, or as it is technically called *cy-pres*." It may be added that James, L. J., expresses his opinion, p. 72, that the consent of a guardian appointed by the infant herself would not have satisfied the condition.

COPYRIGHT.

The point of practice as to costs which arose in the next case, *Dick* v. *Yates*, p. 76, was duly noted among the Recent English Practice Cases for Oct. 15 ult., and we will merely add here that some points of considerable importance as to the law of copyright in the matter of titles of books arose in it, and an opinion is clearly expressed (see pp. 89, 93), that there cannot in general be any copyright in the title or name of a book. At p. 90, James, L. J., distinguishes the unauthorized use of a man's name or of the title of his work as an ordinary common law fraud, and not one of the two modes of invasion, (*a*) "piracy," (*b*) "literary larceny," against which the Copyright Acts have protected an author.

EXECUTORS.

The main point in the next case,—*In re Morgan, Pilgrem* v. *Pilgrem*, p. 93, proceeds upon the "very clear" principles (per Fry, J., p. 99) that (1) if an executor, in pursuance of

the directions contained in the testator's will, carries on the testator's business, and in so doing contracts debts, the fact that he has carried on the business in his own name, and that the testator's assets employed in it are ostensibly the executor's own property, will not entitle a judgment creditor of the executor to take in execution the testator's assets; but (2) lapse of time and an enjoyment of the assets in a manner inconsistent with the trusts of the will, coupled with the consent of the beneficiaries, may raise an inference of a gift of the assets by them to the executor, and entitle his judgment creditor to take them in execution. Yet (3) when the possession, and the time which has elapsed are in accordance with the trusts of the will, no such inference can arise.

MORTGAGE.

Ex parte Harrison, in re Betts, p. 127, is also a case "entirely covered by authority" (per Bacon, C. J.), the points decided being (1) that the proceeds of a distress for rent levied under an attornment clause in a mortgage deed are, in the absence of any provision to the contrary in the deed, applicable to the payment of principal as well as interest; and (2) the fact that the yearly rent reserved by the attornment clause is equal in amount to the yearly interest of the mortgage debt as provided by the deed, and is made payable on the same days, is not of itself sufficient to displace the *prima facie* right of the mortgagee to apply the proceeds of the distress in satisfaction of principal as well as interest.

PURCHASE BY RAILWAY— STATUTORY CONSTRUCTION.

In *in re Pigott & the G. W. Ry. Co.*, p. 146, there is a point decided which seems to call for some notice, viz., that a complete contract being established between a railway company and a landowner by the notice to treat, and an award under the Imp. Lands Clauses Consolidation Act, 1845, fixing the amount of the purchase money, the ordinary rules as between vendor and purchaser apply to such a contract, including the liability of the purchasing company, in a proper case, to pay interest on their purchase-money. The two sections of the Imperial Act, relied on as altering the general law, do not, however, occur in our General Railway Act, (R. S. O. c. 165), though it may be remarked that the argument grounded on sec. 75 of the Imp. Act might be raised equally speciously on sec. 22 of R. S. O., c. 165. The former provides that on deposit in the bank of the compensation awarded, the owner shall when required convey,—and the latter provides that upon payment of the compensation awarded, or on its deposit, as in that Act provided, the award shall vest in the company the power to take possession of the lands, and in neither case is interest mentioned. But as to this, Jessel, M. R., says (p. 152): "No doubt in the ordinary case, where the interest is payable, the vendor is not bound to convey till his purchase money and the interest thereon are paid to him; but the mere fact of his conveying without the payment of the interest would not deprive him of the interest: and in some cases, as we know, he has got interest even after the conveyance, so it is no conclusive that, because on payment the vendor is bound to convey, he therefore loses the interest when he is entitled to it." He ordered the Company to pay interest at 4 per cent. per annum on the purchase-money from the time when they might have taken possession or entered into the receipt of the rents, on a good title being shewn. It may be added that at p. 151, the M. R. observes that where it is not contended that there is any enactment in words, but where the Court is asked to infer an enactment from certain provisions to be found in the Act, —in such cases the argument of reasonableness and common justice ought to have great weight.

RAILWAYS.

The next case,—*In re Birmingham and Lichfield Ry. Co.*,—is a decision of the M.R. that a railway company which has never commenced to acquire the lands or construct the railways authorised by their Act is not an

"undertaking" within the meaning of sec. 4 of the Imp. Railway Companies' Act, 1867, (Imp. 30-31 Vic., c. 127,) of which a receiver can be appointed under that section. The section in question places restriction on execution by a judgment creditor against the rolling stock and plant of railways, but provides that such creditor may obtain the appointment of a receiver "of the undertaking of the company." There appears to be no parallel enactment in our own General Railway Act (R.S.O., c. 165), in the interpretation clauses of which, it may be added, "the undertaking" is defined to mean "the railway and works, of whatever description, by the special Act authorised to be executed." There is a *dictum* in the judgment in this case that a receivership, under the above section 4, does not extend to unpaid calls.

UNDUE INFLUENCE—PARENTAL CONTROL—SOLICITORS.

The case of *Bainbrigge* v. *Browne*, p. 188, is one of some interest, it establishes the propositions that (1) when a deed conferring a benefit on a father is executed by a child who is not emancipated from the father's control, if the deed is subsequently impeached by the child, the *onus* is on the father to show that the child had independent advice, and that he executed the deed with full knowledge of its contents, and with a free intention of giving the father the benefit conferred by it, and if this *onus* be not discharged the deed will be set aside; (2) this *onus* extends to a volunteer claiming through the father, and to any person taking with notice of the circumstances which raise the equity, but not further. In this case the children, who desired to have a deed set aside as improperly obtained, were as follows: a daughter about twenty-five, a son about twenty-four, and a second son about twenty-two. Fry, J., held that none of them were entirely emancipated from the father's control. He says, p. 196, "None of them appears to me to have been conversant with business. The young lady had been residing in her father's house, and had not, apparently, in any way mixed in the world except under his control and under his roof; at all events she had not resided apart from him. The two sons were students in Universities, and were not familiar with legal matters." The deed in question was one in which the children had charged their reversionary interests under a marriage settlement with the payment of certain mortgage debts due by their father. They executed it in the presence of a clerk of their father's solicitor, who had prepared or approved the deed, the clerk attesting their execution. Fry, J., adverts to this fact, at p. 198 of his judgment, where he says:—"Unless I am to hold that it is absolutely necessary that the solicitor who is advising the children in such a case should be a different person from the solicitor who is advising the parent, I am unable to find that the defendants had notice of any of the circumstances from which undue influence can be inferred," and held the defendants had no such notice.

FORCIBLE ENTRY.

The case of *Edwick* v. *Hawkes*, p. 199, illustrates and interprets the statute of 5 Rich: 3, stat. 1, c. 8 relating to forcible entry, which would appear to be in force in this country just as other ancient English statutes relating to the same subject have been held to be, (*Boulton* v. *Fitzgerald*, 1 Q. B. 344; *R.* v. *McGreavy*, 5 O. S. 620.) The statute in question provides that even where there is a legal right of entry, no man shall enter with strong hand, nor with multitude of people, but only in a peaceable and easy manner. And Fry, J. held in this case that where a tenant, under a mistaken idea that he had forfeited his lease, and to avoid immediate eviction, signed a writing as follows: "I undertake to give you quiet possession on the 29th instant, and you may use this letter as leave and license to eject me without any process of law on that date;" this was in effect a license to commit a crime under the above act, and therefore void. The learned Judge further holds, p. 21, that the operation

of the statute is not confined to the mere act of getting over the border, the edge, of the property in question peaceably, but that, if an entry be made peaceably, and if, after entry made, and before actual and complete possession has been obtained, violence be used towards the person who is in possession, that is criminal within the Statute of Rich. II.

SPECIAL COVENANT BY TENANT.

It is also held in this case, that (1) a covenant by the tenant of a public-house to purchase of his landlord all beer to be sold or consumed in or upon the premises is not broken by the tenant buying through an agent, without the knowledge of the landlord, beer made by the landlord; and (2) an *obiter dictum* is expressed, p. 207, that in the case of such a covenant, and in the absence of express stipulation, there is an implied obligation on the part of the landlord to supply the tenant with such kinds of beer as he requires, and if this obligation is not fulfilled the tenant is at liberty to buy the beer which he requires elsewhere.

There still remain several noticeable cases in the number of the L. R. 18 Chy. Div. which we have been reviewing, but space compels us to postpone any remarks upon them until our next number, as also upon the recent issues of our own reports,—46 Q. B., Nos. 4 & 5; 5 S. C. No. 2; and 6 App. R. Nos. 5, 6 & 7—now before us.

ACTS OF LAST SESSION.

IMPERIAL 44-45 VICT.

It is obviously unnecessary to review the recent English enactments with the same particularity as we reviewed those of this Province and of the Dominion in our numbers for September 1 and October 15, respectively. Still it can scarcely fail to be of interest, and it may be of considerable importance, to review the more important measures of law reform passed by the Imperial parliament, the more especially as the wisdom of our legislature prompts it so often to avail itself of the ripe learning and wide experience of the lawyers and statesmen of the mother-country. As we observed on Oc 15, chaps. 1-22 of the volume of Imperial statutes now before us contain nothing in the nature of law reform, nor is it until chap. 41 is reached that special attention is called for.

Chap. 41 is entitled—"An Act for simplifying and improving the practice of Conveyancing; and for vesting in Trustees, Mortgagees, and others, various powers commonly conferred by provisions inserted in Settlements, Mortgages, Wills, and other instruments; and for amending in various particulars the Law of Property; and for other purposes:"—but as our contemporary, the *Law Journal* (Eng.) observes, brevity, alliteration and respect for its author claim it as "Cairns' Conveyancing Act." It is of considerable length, but the numerous articles, already published in our English contemporaries, greatly facilitate us in making such observations upon it as seem in place here. The *Law Times*, (Eng.) regards the Act very unfavourably, declaring that it is open to the criticism passed by Mr. Toots upon his distinguished friend, the Chicken, viz., that its expressions are coarse and its meaning obscure; and observes with amusing sarcasm—"If we were asked to take upon us the invidious task of pointing out the worst-drawn section in the Act, we should, humbly and with a deep sense of the difficulty of selection, yet with a modest confidence, lay our finger upon section 9;" while it also hazards the conjecture that sect. 14 "alone would suffice to provide the Chancery Division with work for years to come."

We shall notice here such of the provisions as seem of special interest in the light of our own conveyancing law, which are not indeed very numerous. The character of conveyancing in England where pro-

perties are of immense value, where the retaining of estates in families is of vital importance to the nobility and landed gentry, and where, moreover, an effectual system of registration of title seems unattainable, is necessarily greatly more complex than it is ever likely to be on this continent, and many of the provisions of the Act have no bearing upon conveyancing as it exists with us.

The first section we would call attention to is sec. 4, which provides that if, on the death of any person, there is a subsisting contract for the sale of a freehold estate of inheritance, enforceable against his heir or devisee, "his personal representative shall, by virtue of this Act, have power to convey the land for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract." Imp. 38-39 Vict. c. 87, sec. 48, which corresponds to our R. S. O. c. 107, sec. 5, provided that if a bare trustee dies intestate as to fee simple trust estates, these shall vest in the legal personal representative from time to time of such trustee. But in *Morgan* v. *Swansea Urban Sanitary Authority*, L. R. 9 Ch. D. C. 582, the M. R. decided that a vendor who had let the purchaser into possession, and then died intestate before payment of the purchase money, was not a bare trustee within this last mentioned section. The difficulties arising from this decision appear rectified in England by the new enactment: and compare R. S. O. c. 107, sec. 25.

At sec. 7 commences that part of the Act which concerns certain covenants for title which are to be *implied* in conveyances made after the Act, but which may be varied by deed, and "as so varied or extended, shall, as far as may be, operate in the like manner, and with all the like incidents, effects and consequences, as if such variations or extensions were directed in this section to be implied." This certainly appears a less satisfactory method than that adopted with us of giving short forms of covenant, with an enactment that the covenants given *in extenso* should be implied.

Then after certain enactments as to production and safe custody of title deeds, sec. 10 provides that the benefit of every covenant of a lessee, and the obligation of every covenant of a lessor, which has reference to the subject matter of the lease shall run with the reversion, and it also provides for the apportionment of all conditions contained in leases on severance. Sec. 14 contains restrictions on and relief against forfeiture of leases; sec. 15 enables a mortgagor to require a mortgagee to transfer instead of to re-convey; sec. 18 enlarges the leasing powers of mortgagors and of mortgagees in possession; sec. 19-24 contain new provisions as to mortgagee's powers of sale, insurance, timber-cutting, etc.; sec. 25 provides for sale in actions of foreclosure, sec. 26-29 provides for a statutory form of mortgage; sec. 30 provides that the legal personal representative of a sole trustee or mortgagee in whom an estate of inheritance is vested, and who dies after the act, shall have power to deal with the estate; thus going further than our enactment, R. S. O. c. 107, sec. 15, which only applies to mortgages, and to cases where the mortgage money is paid; sec. 32 provides for the retirement of a trustee, with the consent of his co-trustees, and such person if any who has power to appoint trustees, without any new trustee being appointed; sec. 35 relates to the mode in which trustees may sell, *e. g.*, by auction or private contract, etc.; sec. 37 empowers executors and trustees to compound for any debt or claim; secs. 41, 42 and 43 relate to sales and leases on behalf of infant owners, and to the management of land and receipt and application of income during minority; secs. 46-48 relate to Powers of Attorney, and enable a donee of a power of attorney to execute in his own name, and relieves him, when acting *bona fide* from all liability arising from the death, lunacy or revocation of the donor, of which he had no notice; secs. 49-64 contain sun-

dry enactments as to the construction and effect of deeds and other instruments, of which one of the most noticeable is contained in sec. 54 which provides that a receipt for consideration, money or securities in the body of a deed shall be a sufficient discharge for the same without any further receipt for the same being endorsed on the deed; sec. 65 provides for the enlargement of the residue of long terms into fee simples; lastly, sec. 70 contains a most important provision that an order of the Court under any statutory or other jurisdiction shall not, as against a purchaser, be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not. This goes far beyond the terms of Imp. 19-20 Vict., c. 120, sec. 28, (in force in this Province by virtue of R. S. O. c. 40, sec. 85), and as the *Law Journal* (Eng.) observes, one result will probably be that even a recent sale from the Court will generally be made a root of title on a resale out of Court.

Of the remaining Acts in this volume of the Imperial Statutes we need say but little. Chap. 49 comprises the Land Law (Ireland) Act, 1881, but it not until chap. 60 is reached that we find any statute of general interest from the point of view of law reform. Chap. 60 is an Act to Amend the Law of Newspaper Libel, and to provide for the registration of newspaper proprietors. Of this we need merely mention sec. 2, as the rest of the provisions of the Act relate to matters of procedure, and of registration of the proprietors. Sec. 2 provides that "Any report published in any newspaper of the proceedings of a public meeting shall be privileged, if such meeting was lawfully convened for a lawful purpose and open to the public, and if such report was fair and accurate, and published without malice, and if the publication of the matter complained of was for the public benefit: provided always, that the protection intended to be afforded by this section shall not be available as a defence in any proceeding, if the plaintiff or prosecutor can show that the defendant has refused to insert in the newspaper in which the report containing the matter complained of appeared, a reasonable letter or statement of explanation or contradiction by or on behalf of such plaintiff or prosecutor."

We can now pass on to chap. 68, which is an Act to Amend the Supreme Court of Judicature Act, and is to be called—"The Supreme Court of Judicature Act, 1881." Sec. 2 is of historical interest in that it provides that the present *and every future Master of the Rolls* shall cease to be a Judge of H. M.'s High Court of Justice, but shall continue by virtue of his office to be a Judge of H. M.'s Court of Appeal. The sections 3-8 inclusive merely relate to the organization of the Courts. Secs. 9-10 concern appeals under the Imp. Divorce Act, 20-21 Vict., c. 85. Sec. 11 amends sec. 4 of the Supreme Court of J. Act, 1875, by enacting that a judge who was not present and acting as a member of a divisional court of the High Court of Justice, at the time when any decision which may be appealed from was made, or at the argument of the case decided, shall not, for the purposes of that section, be deemed to be, or to have been, a member of such divisional court. (cf. Ont. J. A. sec. 4 taken in connection with R. S. O. c. 38, sec. 13). Sec. 12 provides that in cases of urgency one judge may officiate for another. The remainder of the Act concerns merely matters of administration and organization, and need not be further noticed here.

The next Act, chap. 69, applies to all parts of the empire, and is an Act to amend the law with respect to fugitive offenders. Sec. 2 provides that where a person accused of having committed an offence (to which this part of this Act applies) in one part of H. M.'s dominions has left that part, such person, if found in another part of H. M.'s dominions, shall be liable to be apprehended and re-

ONTARIO.

IN THE COURT OF APPEAL.

NOVEMBER 28.

From Queen's Bench.]

ROBINSON v. HALL.

Nonsuit—New trial—Appeal.

The plaintiff being in possession of land as tenant of H., was evicted by the defendant, who claimed under an overdue mortgage. A nonsuit was entered at the trial, on the ground that the defendant was at law entitled to the possession, evidence of equitable rights to possession in the plaintiff being refused. A new trial was directed.

Held, that this Court should not interfere.

Bethune, Q,C., for the appellant.

J. K. Kerr, Q.C., for the respondent.

From Common Pleas.]

THE ANCHOR MARINE INSURANCE CO. v. THE PHŒNIX INSURANCE CO.

Insurance—Freight—Loss.

The plaintiffs were insurers of a cargo of grain, and the defendants insurers of both hull and freight of the vessel, which was owned by M. The vessel sank during the voyage and damaged the grain. The master refused to deliver it to the plaintiffs unless his freight were paid. The plaintiffs paid the freight and took an assignment of M.'s policy. Both the owner and the plaintiffs thought it more prudent to take the cargo to Buffalo, as being more saleable there than in Kingston, its original place of destination, which was accordingly done. The plaintiffs now sued on the defendant's policy as assignees of M.

Held, affirming the decision of the Court below (30 C.P. 570) that they were not entitled to recover; for their only rights were those of M., who had suffered no loss for which the defendants were liable, inasmuch as he had paid his freight.

Maclennan, Q.C., for the appellants.

Robinson, Q.C., and *H. W. M. Murray*, for the respondents.

GILDERSLEEVE v. MCDOUGALL.

Contract—Breach—Cause of action—C. L. P. Act, sec. 49.

The plaintiff, at Kingston, Ontario, having ascertained the price of forging a cross-head for an engine, wrote to the defendant at Montreal, Quebec:—"I am in receipt of your telegram in answer to mine, hoping you will forge cross-head at 7c. per lb., and enclose drawing, which explains itself. Please leave metal enough to finish up to the sizes in the drawing, and ship to me as soon as finished per G.T.R." In answer, the defendant wrote:—"Yours of 20th duly at hand, with sketch of cross-head inclosed. The same will have immediate attention, and as soon as ready I will ship to your address." The cross-head was planed in Kingston, where a defect in the forging was discovered, and the beam, after being used on the plaintiff's steamer for several months, broke at the defective point. On a motion to set aside the service of the writ, the plaintiff undertook to prove at the trial a cause of action which arose in Ontario, or in respect of a contract made therein.

Held, reversing the decision of the Court below (31 C.P. 164), that the contract being to forge and deliver on the G. T. Railway at Montreal, was a contract made in the Province of Quebec, and as the defect in the beam, being the breach of the warranty that it should be reasonably fit for the purpose for which it was made, existed when it left the workshop at Montreal, the breach also occurred in that Province, and the plaintiff should therefore be nonsuited.

McMichael, Q.C., for the appellant.

Bethune, Q.C., for the respondent.

ROBINS v. VICTORIA MUTUAL FIRE INSURANCE COMPANY.

Fire insurance—Loss—Proof within 30 days—Relief from—R. S. O. cap. 162.

Held, affirming the judgment of the Court below, that R. S. O. cap. 162, applies to Mutual Insurance Companies.

Held, also, that the second section of that Act applies to the time within which proofs of loss may be delivered, as well as to the proofs themselves; and the plaintiff having failed, through accident, to deliver his proof within 30 days from the loss, was entitled to recover.

Burton, J.A., dissenting.

McCarthy, Q.C., and *Bruce* for the appellants.

Lennox, for the respondent.

PEAK v. SHIELDS.

Insolvent Act of 1864, sec. 8, sub-section 7—Insolvent Act of 1875, sec. 136—Fraud in obtaining credit—Contract made abroad—Jurisdiction of Parliament of Canada.

The plaintiffs sued for goods sold and delivered to the defendants, who were insolvents, and, under sec. 136 of the Insolvent Act of 1875, charged fraud in the defendants in pro-

curing the goods on credit, knowing themselves to be unable to meet their engagements and concealing the fact from the plaintiffs. The defendants were domiciled in Canada, and the contract was made in England.

Held, affirming the judgment of the Court below (31 C. P. 112), that the act charged was not a crime, nor were the proceedings criminal, but that the Statute gave an additional remedy for the recovery of the debt; and it made no difference, therefore, that the contract was made in England.

Per Spragge, C.J.O. (Morrison, J.A., concurring). Section 136 of the Insolvent Act of 1875, dealing with matter of procedure incident to the law of Bankruptcy and Insolvency, was within the jurisdiction of the Parliament of the Dominion of Canada to enact.

Per Burton, J.A. This section, which gives certain creditors a remedy for the recovery of their debts in full, is contrary to the policy of insolvency laws, which aim at a rateable distribution of the assets among all the creditors of the insolvent, and does not properly come under the head of Bankruptcy and Insolvency, and is, therefore, *ultra vires* of the Parliament of Canada. But section 8, sub-sec. 7, of the Insolvent Act of 1864, to the same effect, is still in force, the Parliament of Canada having no power to repeal it.

Per Patterson, J.A. The plaintiff is entitled to recover whether sec. 136 of the Insolvent Act of 1875 is *ultra vires* or not; for the Parliament of the Dominion of Canada either had power to deal with the subject of this section, in which case it would be binding; or it had not the power to do so, in which case the same enactment in the Insolvent Act of 1864 is unrepealed and in force.

Bethune, Q.C., for the appellants.

Rose, Q.C., for the respondents.

From Court of Chancery.]

WATSON v. LINDSAY.

Unpatented lands — Mortgage — Sale under power—Patent—Statutes of Limitations.

D. A. C., being the locatee of the Crown, in 1860 mortgaged the north half and the south half of the land by two mortgages to McM. In 1865, he died. In 1870, McM. assigned one mortgage to D., and in 1874 he assigned the other. In 1875, the patent of the north half issued to one Campbell, who paid the purchase money due the Crown on the whole lot at the request of M. C. and H. C., the widow and son respectively of D. A. C., and patents of the east and west halves of the south half, issued to M. C. and A. C. respectively, without intending (as shown by the memo. in the Crown Lands Department), to cut out the rights, if any, of D. under his mortgage. In 1876, D. sold under the power in his mortgage to L., who, in 1877, made a mortgage to the plaintiff on which this suit was brought. D. A. C., M. C. and A. C. had, in the meantime, always occupied the land without paying interest, and they claimed title by possession.

Held, affirming the decision of the Court below (27 Gr. 253), that the Statute of Limitations having commenced to run, was not interrupted either by the sale under the power in D.'s mortgage, which conveyed only the estate which D. had, or by the granting of the land by patent in 1875.

Black and *Francis*, for the appellant.

J. K. Kerr, Q.C., and *Beck*, for the respondents.

THE ATTORNEY-GENERAL OF ONTARIO *ex rel.* BARRETT v. THE INTERNATIONAL BRIDGE COMPANY.

Injunction — Bridge Company — Specific performance of Act of Parliament—Locus standi of Attorney-General of Ontario.

The defendant company was incorporated for the construction of a bridge from Canada to the United States across the Niagara river, which was to be, "as well for the passage of persons on foot, and in carriages, and otherwise, as for the passage of railway trains." The company completed the bridge for railway purposes only. The time limited by the charter for the completion of the work having elapsed, an information was filed, seeking to restrain the use of the bridge by a railway company to which the bridge had been leased, until put into condition for ordinary traffic, or for the removal of the bridge as a nuisance, and to compel permission of its use by foot passengers on payment of the statutory tolls. The bridge, owing to engineering difficulties, could not be adapted to the use of carriages and foot passengers.

Held, reserving the decree of Spragge, C. (28 Gr. 65), that the abandonment of that portion of the work which was to have accommodated foot passengers and carriages was not a public nuisance, but probably an abuse of the Act of Incorporation; that the Act of Incorporation was not a contract of the public, but merely gave conditional powers, creating correlative duties; that the Act was permissive, and specific performance thereof would not be enforced.

Held, also, that the Attorney-General for Ontario, as representing only a limited portion of the public with whom, if at all, such a contract existed, had no *locus standi*.

The work being one within the jurisdiction of the Parliament of Canada, the Attorney-General of Canada, presumably with the

knowledge of the state of the bridge, allowed debentures to be issued charged upon it.

Held, that upon this ground, also, the Attorney-General of Ontario was not the proper party to file the information.

Held, also, that, as the bridge extended beyond the limits of the Province, part only being therein, it would be unavailing for the Court to give the public the right to pass over that part of the bridge only which was within its jurisdiction; and for this reason, also, the Court would not interfere.

LOWSON v. THE CANADA FARMERS' INSURANCE COMPANY.

Mutual insurance—Proprietary policy.

The defendants were authorized by their charter to carry on both proprietary and mutual insurance business; but they were debarred from taking risks which were extra hazardous in the mutual branch. The plaintiff's property, falling within the prohibited class, was insured with the defendants, and he gave a premium note, instead of making a cash payment, but the policy issued to him was not a mutual policy, but an absolute un ertaking to pay the loss. He also paid several assessments.

Held, reversing the judgment of the Court below, that the policy was not a mutual one, there being nothing except the premium note (which was not conclusive) to indicate that it was a mutual insurance, and the property being of such a nature that it could not be insured in the mutual branch.

Crooks, Q.C., and *Cattanach*, for the appellant.

Maclennan, Q.C., and *W. Cassels*, for tbe respondents.

From Proudfoot, V.C.]

GRIFFITHS v. PERRY.

Insolvent Act of 1875, *secs.* 130, 132—*Fraudulent preference.*

The plaintiffs, who were sub-contractors for the stone and brickwork of a public school, and who were to receive payment from the principal contractors, who were the only contractors recognized by the Public School Board, procured an assignment to themselves of the balance due them by the contractors for their completed work, and payable to the contractor by the Board. The contractors were, at the time, unable to pay their debts, which the plaintiffs knew, and an attachment in insolvency issued against them within three months after the assignment of the claim.

Held, affirming the decision of the Court below, that the assignment was a contract within the meaning of sections 130 and 132 of the Insolvent Act of 1875, and the plaintiffs could not maintain a bill to enforce payment of the balance assigned to them.

Bain, for the appellant.

W. Cassels, for the respondents.

DAVIDSON v. OLIVER.

Will, construction of—Legacy—Condition.

A., by the third clause of his will, devised and bequeathed the residue of his estate to his wife four sons and two daughters, the devise and bequest being subject to the condition that they all unite in paying to the executors the money for the legacies to two of the sons, Alexander and Duncan. By the 4th clause he gave the legacies without condition to Alexander and Duncan. By the 5th clause he devised to his sons Douglas and Oliver two lots; and after giving several legacies to his daughters he proceeded, "and further, that Alexander and Duncan work on the farm until the legacies become due." Alexander left the farm and entered into mercantile pursuits.

Held, affirming the decision of the Court below (Patterson, J.A., dissenting), that Alexander was entitled to the legacy absolutely, and that the testator's wish that he should work o the farm was not a condition precedent to his right thereto.

Moss, for the appellant.

Boyd, Q.C., for the respondent.

SCOTTISH AMERICA INVESTMENT COMPANY v. THE CORPORATION OF THE VILLAGE OF ELORA.

Municipal Corporation—Loan for encouragement of industry—Power to loan—Debentures—Rate of Interest on.

Held, affirming the decision of the Court below, that a municipality, acting under 36 Vict. cap. 48, sec. 372, sub-sec. 5 (O.) has power to lend money for the encouragement of any branch of industry, notwithstanding the use of the word "bonus" therein, which does not necessarily import a gift; and they are therefore liable on their debentures issued for the purpose of raising money to be so lent.

The rate of interest payable on the debentures was seven per cent.

Held, that section 217 of 29-30 Vict. cap. 51, has not been repealed, though marked "effete" in the schedule to, and not re-enacted in, 36 Vict. cap. 48 (O.), and that the above rate was lawful.

Jacob, for the appellants.

Robinson, Q.C., and *Bruce*, for the respondents.

MCEDIE V. WATT.

Collusive judgment—R. S. O. cap. 118.

Held, affirming the decision of Blake, V.C., that the cases under the Absconding Debtors' Act do not apply to cases coming under R. S. O. cap. 118.

Labatt v. *Bixel*, 29 Gr. (not yet reported) approved and followed.

Gibbons, for the appellant.

R. C. Smith, for the respondent.

CALVERT V. BURNHAM.

Specific Performance of agreement to lend—Cloud on title—Mortgage—Demurrer.

A bill alleged that a mortgage was executed by W. to the defendant in consideration of $450, that the defendant advanced only $150 thereon, and W. being entitled to receive the balance conveyed his equity of redemption to the plaintiff and assigned the rights to receive the balance, that the defendant refuses to pay the balance, and claims to hold the mortgage as security for $450. The prayer was for specific performance, or, in the alternative, a declaration of the above facts and for general relief. At the hearing the learned Judge allowed a demurrer *ore tenus*, on the ground that an agreement to lend money would not be specifically performed.

Held, reversing this judgment, that, upon the facts alleged in the bill, viz., that the mortgage was being held for more than had been advanced thereon, and therefore to that extent formed a cloud upon the title, the plaintiff would be entitled to a declaration to that effect and appropriate relief and as the demurrer admitted the truth of the allegation it should have been overruled.

Bethune, Q. C., and *Poussette*, for the appellant.

E. Blake, Q. C., for the respondent.

From C. C. York.]

BANK OF MONTREAL V. GILCHRIST.

Landlord and tenant—Attornment—Title.

S., being indebted to the plaintiffs, entered into an agreement amongst other things to mortgage to them certain lands (amongst others) known as the Dominion Hotel property. A mortgage was the same day executed, but by mistake the Dominion Hotel property was omitted therefrom, and a lot formerly owned by S. adjacent thereunto inserted. The defendant had been the tenant of S., and after the mortgage attorned and paid some rent to the plaintiffs, believing them to have title to the lands. This action was for arrears of rent.

Held, affirming the decision of the Court below, that, after such attornment and payment of rent, the defendant could not be heard to deny the plaintiffs' title, and they, being the equitable owners of the land, were entitled to recover.

Held, also, that the title thus not being open to question the County Court had jurisdiction.

Tilt, for the appellant.

Ferguson, Q. C., for the respondent.

BOOTH V. PRITTIE.

Yearly hiring—Defeasible contract—Statute of Frauds.

Held, reversing the decision of the Court below, that a contract of hiring for a year or more, defeasible within the year, is within the 4th section of the Statute of Frauds.

Maclennan, Q. C., for appellant.

J. McGregor, for the respondent.

SATO V. HUBBARD.

Garnishee proceedings—County Court—Appeal.

There is no appeal from an order made in garnishee proceedings in a County Court, appeals from the County Court being expressly limited to the cases mentioned in section 35 of the County Courts Act. Section 200 of the C. L. P. Act does not give a general appeal from the County Courts, being controlled by the subheading preceding section 189.

Bealy, Q. C., for the appellant.

Tilt, for the respondent.

WATSON V. SEVERN.

County Court—Liquidated demand—Jurisdiction—Corroboration.

K. sold for S. (the defendant's testator) a quantity of goods, which the former in his evidence said was a definite quantity—which he could not recollect, but not less than 30 hhds., and not more than 40—at the price of $10 per hhd.. The plaintiff sued for the price of 30 hhds.

Held, that the demand was liquidated by the act of the parties at the time of the sale, and that the action was within the jurisdiction of the County Court.

K. had assigned to the plaintiff the moneys due him by S.

Held, that K., who was a witnesss, was not "an opposite or interested party to the suit,"

within the meaning of the Evidence Act, and his evidence did not require corroboration as against the executors of S.

Tilt, for the appellant.
Delamere, for the respondent.

From C. C. Peel.]

ANDREWS v. STUART.

Assignment for creditors—Revocable deed—Preference—R. S. O. cap. 118, sec. 2—Surprise.

A deed of stock in trade and lands was made by B., an insolvent debtor to the plaintiff, in trust to convert the same into money, pay the expenses of the trust, retain 10 per cent. of moneys received by way of compensation, and to pay "the present execution and other privileged creditors, if any, according to privilege, and in such amounts as they might agree to receive, next to divide the balance *pari passu* among other creditors, and to pay the surplus, if any, to B." The plaintiff took possession under the deed. The trustee was not a creditor, and there was no evidence of any acceptance of the deed by any of the creditors. The defendant seized under an execution a few days after the deed.

Held, affirming the judgment of the Court below, that the deed was a revocable, voluntary instrument, the relation of trustee and *cestui que trust* not having been established between the plaintiff and the creditors, and, therefore, was void as against the defendant.

Held, also, that it was void under R. S. O. cap. 118, sec. 2, as it did not provide for the paying rateably and proportionably, and without preference or priority, all the creditors, but gave a preference to others besides existing execution creditors.

The abstaining of a party from proof under an idea that his adversary had no real intention of putting him to such proof, and being thereby taken by suprise, is not a ground for granting a new trial.

J. A. Patterson, for the appellant.
Bruce, for the respondents.

From C. C. Northumberland and Durham.]

WATSON v. BRADSHAW.

Promissory note—Gift inter vivos.

The plaintiff had performed services for one P. in his lifetime; and he, intending to make some recognition thereof, told her that a certain promissory note, payable to himself, was hers, saying,—"Here is your note; take it when you want it." The plaintiff told P. to keep it for her as she had no place in which to keep it, and he did so.

Held, affirming the decision of the Court below, that the gift was not complete.

Moss, Q. C., (with him *R. R. Loscombe*), for the appellant.

J. K. Kerr, Q. C., for the respondent.

CHANCERY DIVISION.

Proudfoot, J.] [December 7.

SCHOOL BOARD OF NAPANEE v. THE MUNICIPALITY OF NAPANEE.

Mandamus—Return.

The mode of procedure, when a return has been made to a mandamus *nisi* and the plaintiffs are not satisfied with it, is to demur, plead to or traverse the return, to which the defendants may reply, take issue, or demur.

DICKEY v. NEIL.

Receiver—Costs.

The necessity for a Receiver's obtaining the sanction of the Court before commencing suits is for the protection of the fund. Where he proceeds without this sanction he will in general be refused his costs, though costs may be allowed him if his action has been beneficial to the fund.

Where a Receiver in such a case brought a suit without meaning to look to the fund,

Held, that he had a right to do so, and the defendant could not object to his obtaining the relief with costs.

RODY v. RODY.

Dower—Election.

A testator appointed three executors, and directed that his real estate should be leased to one of them until J. R. and J. should attain twenty-one. There were also benefits conferred upon his widow by the will.

Held, that his widow was bound to elect.

DRYDEN v. WOODS.

Will—Construction of.

A testator directed that, at the death of his wife, if she survived him, all his estate (with certain exceptions) should be sold, and the proceeds equally divided among his four daugh-

ters and three sons and their children, after paying $200 to each of the three children of his deceased daughter R. He left surviving him his widow, who was still living, three sons and four daughters, and twenty-seven grandchildren. Two of the grandchildren were born after the date of the will but before the testator's death, and one was born after his death.

Held, that all the children and grandchildren would take concurrently who were in existence at the death of the widow; but as other grandchildren might still come into being who would not be bound by the present proceedings, the Court declined to make an order.

MCDONALD V. FORRESTAL.

Sale of goods—Passing of property.

The plaintiffs shipped crude oil to A., who was a refiner, on the agreement that the property should not pass till A. made certain payments. A., without making the payments, sold to the defendant, without the knowledge of the plaintiff, who dealt with A. as a refiner only.

Held, following *Hyman* v. *Walker*, 1 App. 345, that the plaintiff was entitled to judgment against the defendant for the price of the oil.

LEE V. CREDIT VALLEY RAILWAY CO.

Creditors' suit—Receiver discharged—Creditors' rights.

A Receiver was appointed under the decree in this suit to collect revenue, and, after paying expenses, to pay the balances into Court, which were to be paid out on the report of the Master to the parties entitled as found by him. The plaintiff, pursuant to advertisement for creditors, proved his claim. The Master had not made his report. By 44 Vict. cap. 61 (O.), the defendants were authorized to pledge the bonds or debenture stock to be issued thereunder, and the proceeds were to be paid out on the order of C. and F., who were appointed creditors' trustees, in payment of all moneys necessary to be paid for the discharge of the Receiver in this suit. An order of Court was made, on the application of the defendants, discharging the Receiver without providing for the payment of claimants who had proved under the decree. The Act directed that all who came in under it should take fifty cents on the dollar.

Held, that the position of affairs having altered since the time at which the plaintiff had proved his claim, he was not bound thereby, and should not be restrained from prosecuting an action for his debt to recover the full amount, if possible.

HILLOCK V. BUTTON.

Marriage Settlement—Improvidence—Power of Revocation.

The absence of a power of revocation from a voluntary settlement is not a ground for setting it aside.

The plaintiff, who had just come of age, being about to marry, applied to her solicitor who was also her guardian, for advice as to her property, and had several consultations with him, at which the heads of a marriage settlement were agreed upon. The solicitor did not know the husband, and acted solely in the interests of the plaintiff. Nothing was said about a power of revocation in the settlement, which contained the usual clauses, but gave rather more power than usual to the plaintiff, and was made in consideration of marriage.

Held, that it was not a voluntary settlement; and that, as it contained the usual clauses in such deeds, and simply omitted a power of revocation which is not usual in settlements for value, there was no evidence of improvidence, or ground for setting it aside, in the absence of fraud or mistake.

WRIGHT V. HURON.

Church Society—Commutation fund.

Quære, whether a written license to a parson is not necessary in the Diocese of Huron; but if necessary the defendants, having placed the name of the plaintiff on the list of clergymen entitled to a share in the Commutation Fund, could not afterwards object the want of such license in a suit instituted by him to enforce payment of his share of such fund.

The rights to pass by-laws necessarily imports a right to repeal the same, but this cannot be done to the prejudice of a party who has obtained rights under such by-laws without his assent. Therefore the Church Society of the Diocese of Huron, having received certain moneys, invested the same, and then appointed a committee to consider the future application of the surplus of such fund, and on the report of the committee passed a by-law providing that every clergyman of not less than eight years' active service in the diocese, who was not under ecclesiastical censure, not on the Commutation Fund, and not in receipt of any salary, should be entitled to $200 a year. Under such by-law the plaintiff was placed on the list of clergymen entitled to such allowance of $200 from the surplus interest of such fund, and for some time received it, and the defendants, under an Act of the Legislature, succeeded the Church Society:—

Held, that the plaintiff had a vested interes in such surplus interest of which he could not be deprived, so long as he came within the provisions of the by-law under which he had been placed on such list; and a subsequent by-law repealing all former by-laws, and declaring that all former grants made in pursuance of prior by-laws should cease, could not effect such vested rights of the plaintiff.

CHAMBERS.

Boyd, C.] [Nov. 28.

BANK OF COMMERCE V. BRICKERS.

Mortgage—Foreclosure—Final judgment after appearance—Rule 80.

In an action for foreclosure, the writ was endorsed pursuant to Rule 17 for foreclosure, possession, and immediate payment under the covenant. Upon appearance the plaintiff moved for final judgment under Rule 80, and the defendant filed affidavits imputing fraud to the plaintiff's agent, who obtained the mortgage.

Held, affirming the decision of the Master in Chambers, that the case was not within Rule 80, which applies only to actions when the writ is endorsed pursuant to Rule 14, a distinct procedure having been contemplated for the various claims in mortgage-cases.

Held, also, that the Master rightly refused to allow cross-examinations on the affidavit filed, inasmuch as the motion was not properly made.

Tate Blackstock, for plaintiff.

C. Millar, contra.

Proudfoot, J.] [Dec. 5.

G. v. R.

Foreclosure — Married Woman — Separate Estate.

Action on a mortgage dated 8th June, 1873, and made according to Short Form Act, between G. & S., of &c., and Ellen R., &c., hereinafter called the mortgagors of the first part, and the plaintiff, of the second part.

The mortgagors covenanted in the mortgage that the mortgagors would pay the mortgage money and interest, and observe the above proviso. The bill (filed in June, 1881), contained usual clauses for foreclosure and immediate payment without any averment that the defendant, Ellen R., had any separate estate. The prayer of the bill asked, *inter alia*, for immediate payment by both defendants and foreclosure. The bill had been endorsed with a general endorsement instead of the long form. The case came before PROUDFOOT, J., by way of motion for judgment on Nov. 16.

W. Fitzgerald, for plaintiff.

PROUDFOOT, J.—I have no authority to make a personal order against the defendant, Ellen R., unless she has separate estate. The bill contains no allegation that she has separate estate, and therefore the decree cannot contain an order for payment against her, either out of her separate estate (if any) or otherwise. In other respects the usual decree may go.

Proudfoot, J.] [Dec. 5

SMITH V. BABCOCK.

Foreign Commission—Issue of—Practice.

By an order in the suit dated 4th Nov., 1881, it was directed that a commission might issue directed to John Babcock, Esq., Poughkeepsie, N. Y., a commissioner named on behalf of the defendant, for the examination upon oath of Robert Millard, *viva voce*, as a witness, &c., and of any member or members of the firm of Collingwood, Millard & Co., or persons in the employ of such firm, as witnesses, upon interrogatories on behalf of the defendant.

On 2nd Dec., 1881, the defendant applied to the Clerk of R. and W. for a commission to issue, directed to J. H., Esq., &c., under the order of 4th Nov., without having filed any interrogatories, noting that at present he only desired to examine R. M. *viva voce*, and not to act on the second part of the order. The Clerk of R. and W. refused to issue the commission except in the terms of the order, holding that defendant must either file his interrogatories, or, if he abandoned the latter part of the order, have the order amended accordingly.

A Hoskin, Q.C., applied for a direction to the Clerk of R. and W. to issue the writ as requested.

PROUDFOOT, J.—The Clerk of R. and W. acted properly in refusing to issue the commission. The defendant may amend his order, and take it for the examination of R. *viva voce* alone.

REPORTS.

RECENT ENGLISH PRACTICE CASES

(Collected and prepared by A. H. F. LEFROY, ESQ.*)

LAIRD v. BRIGGS.

Imp. O. 27, *r.* 1—*Ont. O.* 23, *r.* 1 (*No.* 178)

The plaintiff claimed to be tenant in possession of a part of the foreshore of the sea at Margate, and sought to restrain the defendant from removing shingle from the foreshore, and from placing bathing machines upon it. The defendant claimed an easement and by his statement of defence, denied that the plaintiff was or ever had been in possession of the foreshore in question, "save subject to the rights of the defendant."

Held, by Court of Appeal, that the defendant should be allowed leave to amend his statement of defence by striking out the qualifying words, making the denial of the plaintiff's possession an absolute one, and claiming the ownership of the foreshore.

[July 25, C. of A.—45 L. T. N. S. 238.

This was an appeal by the defendant from a decision of Fry, J. (reported 43 L. T. N. S. 632) who refused the defendant leave, at the trial, to amend his defence, so as to turn a qualified denial of the plaintiff's possession of the foreshore in question into an unqualified denial of mere possession.

JESSEL, M. R.—It appears to me that with a view of trying the real question between the parties, that amendment ought to have been allowed. The case between the plaintiff and defendant raised two issues; one issue was the title of the plaintiff to sue the defendant at all; the other was the title of the defendant to the easement he claims by virtue of the statutory right. Now if it could be shewn that the plaintiff had no right to sue the defendant, it seems to me it would not be proper to refuse the defendant leave to amend with the view of trying that question. The plaintiff is not prejudiced; because having stated what he can prove if the Court is of opinion that that is not sufficient he is not injured at all; aud on the other hand, if we allow the defendant to be fixed by what is now really an admission, except by the strictest rules of interpretation, it will deprive him of his property altogether. I think the amendment should be allowed, and the plaintiff should be put to show that he has a title, because I am by no means convinced that there ever was a case in which the Court of Equity or the High Court has interfered on behalf of the plaintiff simply in possession, who had no title to that possession.

[NOTE.—*The Imperial and Ontario Orders are virtually identical. This case was more briefly noted in our issue for Sep.* 15*th.*]

RE SLADE; SLADE v. HULME.

Imp. O. 9, *r.* 2. *O.* 45 *r.* 2 *O.* 47. *Ont. O.* 6 *r.* 2 (*No.* 34). *O.* 41, *r.* 5 (*No.* 370). *O.* 38 (*No.* 339).

Sequestration—Substituted service.

The sequestrators, under a writ issued by the Probate and Divorce Division, applied on motion in the Chancery Division, that a certain annuity, ordered in an administration action in that Division to be paid to him, whose property they were directed to sequester, should be paid to them.

Held, on return of order *nisi*, issued in Chancery Division, they were entitled to have the order made absolute, and it was not necessary for them to commence fresh proceedings to obtain such order.

Also, where he. against whose property the writ o sequestration was issued, had left England, and substituted service of the writ of sequestion, and of the order *nisi* (as it was at first) for the payment of the annuity to the sequestrators, had been made upon a firm of solicitors who had acted for him both in the divorce and Chancery proceedings, and who instructed counsel to appear for him, and show cause against the order *nisi* being made absolute:

Held, substituted service had been properly made, although the time allowed rendered communication between the solicitors and the party impossible.

[Aug. 2, Chy Div.—30 W. R. 28, 45 L. T. N. S. 276.]

(1) With reference to the first point as to the application of the sequestrators, FRY, J., reviewed all the cases bearing on the subject, and said:—

"That exhausts all the authorities on the subject, and it may be observed that there is no case which says that an action is necessary, while there is at all events one case which says that in circumstances like the present an order may be made in an existing action at the in-

*It is the desire of the compiler to make the above collection of cases a complete series of all current English decisions, illustrative of our new pleading and practice, under the Supreme Court of Judicature Act.

stance of the sequestrators. I ask myself if there is any inconvenience in making such an order, and I answer that I can find none. The court is administering the estate of a deceased testator, and one of the persons interested under the will of that testator has, in effect, encumbered his interest in the estate. Nothing is more common than for the Court to assist an incumbrancer, though not a party to the action, and in giving effect here to the sequestration, I am only, in effect, allowing an incumbrancer to assert his claim. I shall, therefore, hold that the application of the sequestrators, by way o, motion in this action, was regular, and that the order *nisi* was properly made."

(2) With reference to the form of order, FRY J., expressed his opinion that the proper form would have been to direct payment of the annuity named by the trustees under the will being administered to the sequestrators, and to order that no other money should be paid to him, whose property was sequestered, without notice being given to the sequestrators.

(3) As to the point with reference to substituted service, FRY, J., said—

"The only question, according to *Hope* v. *Hope*, 4 DeG. M. & G. 328, is this: Has the service been effected on a person actually or impliedly authorized to receive service as agent for an absent principal, and is the inference irresistible that the fact of the service having been affected will be communicated by the agent to the principal? In this case I have not the slightest doubt that Messrs. Stibbard (the solicitors) will communicate with W. S. (the party affected). It is their duty to do so. If I had had the slightest doubt as to the point it would have been removed by the course which the proceedings have taken, for this very firm, without having received special instructions from W. S., have instructed counsel to appear for him."

[NOTE.—*Imp. O.* 9, *r.* 2, *and Ont. Rule No.* 34, *though not identical, are virtually so as regards the part illustrated by this case. The same may be said of Imp. O.* 45, *r.* 2, *and Ont. Rule No.* 370. *We have no order corresponding to Imp. O.* 47, *which gives a right to issue writs of sequestration, without order, to enforce certain judgments; but Ont. Rule* 329 *provides that judgments for payment of money may be enforced by any modes before in use, and G. O. Chy.* 391 *provides for the issue of writs of sequestration.*

THE QUEEN v. SAVIN.

Imp J. A., 1873, *ss.* 19, 45—*Ont. J. A. ss.* 13, 14, 15, 37, 33, 34.

[Dec. 20th, 1880. C. of A.—29 W. R. 688.

No leave is necessary to appeal from a decision of the Q. B. D. upon a special case stated by Quarter Sessions, where the Court is exercising its original common law jurisdiction. Dictum of Lord Cairns, C., in *Overseers of Walsall* v. *L. & N. W. Ry. Co.*, L. R. 4 App. Cas. at p. 42, to that effect approved of.

NOTE.—*The contents of Imp. J. A.*, 1873, *sec.* 19, *seem comprised, though in terms not quite identical, in Ont. J. A. secs.* 13, 14, 15 *and* 37. *Ont. J. A. sec.* 33 *is not identical with Imp. J. A. sec*, 45; *the former seems to require leave in all cases of appeals from the judgment or order of any Divisional Court or Judge to the Court of Appeal, except in the cases therein mentioned whereas the latter appears only to require leave in the case of appeals from the decision of Divisional Courts given on appeal from inferior Courts.*

WILLIAMS v. BRISCO.

Imp. O. 20, *n.* 14.— *Ont. O.*, 25, *r.* 12 (*No.* 214).

Costs — Default of Pleading — Setting aside judgment.

[May 17. Ch. D.—29 W. R., 713.

Action for specific performance of alleged agreement. Plaintiff obtained judgment against the defendant on substituted service and in default of pleading, plaintiff alleging defendant was avoiding service.

Dates were as follows: Writ issued Oct. 19, 1880; statement of claims delivered Nov. 19, 1880; judgment obtained Dec. 18, 1880; and served upon the defendant by affixing it to the door of his residence in February, 1881. The defendant now moved to set aside the judgment,

and that he might be at liberty to appear and defend the action, and that the cost of his application might be costs in the action.

His case was that the judgment was the earliest notification he received of the action, and that, inasmuch as the alleged agreement did not in point of fact exist, he had a good defence on the merits. His affidavit disclosed the ground of his defence.

HALL, V.C., discharged the judgment, and gave the defendant liberty to appear and deliver a statement of defence not later than 14 days from the date of this order, but directed at the same time that the defendant should pay to the plaintiff all his costs of the action subsequent to the delivery of the statement of claim, and including his costs of, and consequent upon this motion.

[NOTE.—*The Imp. and Ont. Orders are identical.*

COX v. JAMES.

Imp. O. 16, *r.* 13—*Ont. O.* 12, *r.* 15 (*b*). *No.* 103.

[Nov. 4, Ch. D.—W. N., 1881, p. 134

The consent which Imp. O. 16, r. 13, (Ont. O. 12, r. 15, b) requires to be given by a person whom it is proposed to add as plaintiff need not be in writing; it is sufficient if the solicitor for the existing plaintiff states that he is authorized to consent on behalf of the proposed new plaintiff, the solicitor taking the ordinary responsibility of using a plaintiff's name.

[NOTE.—*The Imperial and Ontario Orders are identical as regards the part illustrated by this case.*]

HOWELL v. METROPOLITAN RY. CO.

Imp. O. 45. *r.* 3.—*Ont. O.* 41. *r.* 6 (*No.* 371). *Purchase money—Garnishee order—Attachment of equitable debt.*

[Nov. 9, Ch. D.—W. N. 1881, p. 134.

In August, 1878, the defendant company served the plaintiff with a notice to treat in respect of a leasehold house, and on the 27th of November the purchase-money was assessed by a jury and verdict given for £3,650. On the 4th of December a good title to the property was shewn. Before that date, but after the verdict, garnishee orders *nisi* were obtained and served by two judgment creditors of the plaintiff. On the 25th of January, 1879, the plaintiff issued the writ in this action against the company for specific performance, and on the 8th of May obtained judgment with costs accordingly, in pursuance of which the company paid the purchase-money into Court. Other garnishee orders *nisi* were served after good title shewn but before judgment.

Several charges having been given by the plaintiff upon the house and purchase-money, a question arose upon the priorities as between the several incumbrancers, whether the fund in Court was a debt which could be attached by a garnishee order under Rules of Court, 1878, Order 45, r. 3.

Counsel for the holders of the garnishee orders *nisi*, contended that the purchase-money in Court was in the nature of an equitable debt from a purchaser to a vendor, and as such was capable of being attached.

CHITTY, J., held that the purchase-money did not constitute a debt "due or accruing" within the meaning of Order XLV., r. 3, its payment being conditional only, that is, upon the execution of a conveyance by the vendor. The Order meant a debt that had been actually perfected. Consequently the fund could not be attached by the garnishee orders.

[NOTE.—*The Imperial and Ontario Rules are identical.*]

SCHGOTT v. SCHGOTT.

Married woman suing by her next friend—Authority.

[Nov. 4, C. of A.—W. N. 1881, p. 134.]

This was an appeal from the decision of Bacon, V.C., noted in our issue of Oct. 1., p. 365.

The COURT (Jessel, M. R. and Baggallay, Brett, and Lindley, L. J J.) dismissed the action with costs, to be paid by the solicitors of the next friend.

WARNER v. MOSSES.

Imp. O. 12 *Aug.* 1875, *r.* 26—*Ont. O.* 50, *r.* 15 (*No.* 442)—*Costs of interlocutory application—Copies of pleadings.*

[Nov. 5. C. of A.—W. N. 1881. p. 135.]

The Court of Appeal had ordered part of an affidavit filed on behalf of the plaintiff to be ex-

punged as scandalous, and had given the defendants their costs of the application as between solicitor and client. The taxing master disallowed the costs of copies of the pleadings for the use of council and the judges on the ground that it was not the practice to allow the expense of copies of pleadings except at the hearing. Bacon, V. C., disallowed objections to this finding.

The COURT (Jessel, M.R., and Brett and Lindley, L.JJ.) reversed the decision and allowed the cost of the copies, holding that the general rule laid down by the taxing master could not be sustained, and that as the copies were necessary to enable the case to be properly argued they must be allowed.

[NOTE.—*The Imperial and Ontario Rules are identical.*

CLARKE v. BRADLAUGH.

Time from which writ takes effect—Day, fractions of—Fiction of law.

[Nov 14, C. of A.—W. N. 1881, p. 137.

Appeal of defendant from judgment of Queen's Bench Division on his demurrer to the statement of claim, reported L. R. 7 Q. B. D. 151, and noted in in our issue for Sept. 15, p. 343.

The defendant in person argued, as in the Court below, and also that the Parliamentary Oaths Act, 1866, had been repealed in respect to penalties, as well as with respect to the form of the Parliamentary oath, by the Statute Law Revision Act, 1875.

The COURT (Lord Coleridge, C.J., and Baggallay and Brett, L.JJ.) now affirmed the judgment which had been given for the plaintiff by the Queen's Bench Division.

DALRYMPLE v. LESLIE.

Ont. O. 27.

Disclosure—Whether party interrogated is bound to state contents of documents in his possession.

[Nov. 10.—W.N. 1881., p. 138.

Motion by way of appeal from an order of Lindley, J., discharging a master's order directing that the defendant in an action for libel should make a further answer to interrogatories. The plaintiff's second interrogatory required the defendant to state whether she sent any letter or letters to a third person making any libellous statements of the plaintiff set out in the interrogatory, or statements to the same purport and effect, and further to state as fully as she could what her statement or statements were, and to exhibit a copy or copies of them if she had them. The defendant answered that to the best of her recollection and belief she did not send any letter or letters making the statements mentioned in the interrogatory "or any of those exact statements;" that she did write a letter to the third person, but she had no copy of it, and was unable to state "with exactness" what the statements contained therein were.

The COURT (Grove and Bowen, JJ.) held that the answer was sufficient, and affirmed the decision of Lindley, J.

Motion refused.

LAW STUDENTS' DEPARTMENT.

THE LAW SCHOOL.

The revived Law School is hard at work. The Chairman of the School, Mr. Thomas Hodgins, Q.C., opened on 13th inst., with an interesting lecture on Constitutional Law, a subject with which he is very familiar. In his first lecture he took up the question of the relation of the Colonies with local legislatures to the Empire. He will on Tuesday next discuss the various constitutions granted to Canada since the Treaty of Paris in 1763, and subsequently take up the British North America Act and the Criminal Law.

The other lecturers are Mr. J. D. Delamere, who lectures on Pleading and Practice, and Messrs. J. E. McDougall and E. D. Armour, on subjects not yet definitely arranged.

The lectures are given on Tuesday and Thursday until Christmas vacation. They begin again after January 9th, and will be delivered on the Monday, Tuesday, Thursday and Friday of each week until May 1st.

EXAMINATION QUESTIONS AND ANSWERS.

Q. 12. Does the Statute of Frauds affect the creation of trusts, and if so, in what cases and what manner? Give examples of cases where the statute would, and would not, operate.

A.—It requires, by section 7, all creations of trusts of lands to be proved by writing, signed by the party legally capable of declaring the trust; but section 8 makes an exception in favour of trusts arising by operation of law.

Examples. (1.) A person gives a sum of money to his brother and verbally directs the brother to hold it in trust for the brother's infant son and pay it to the son on his coming of age. Here a good trust is created, which can be proved by the verbal direction.

(2.) The same person assigns a leasehold house to the brother and verbally directs that it shall be held in trust for the brother's son. This is void, as a trust of land not evidenced by writing; there will therefore be a resulting trust for the assignor.

Q. 13. Under what circumstances may "secret trusts" or trusts affecting a devisee or legatee be created? State the leading points which have been established on the subject.

A.—If a testator informs a devisee or legatee of the devise to him and states that he wishes him to fulfil certain trusts, and the devisee or legatee promises to fulfil them, or by silence leads the testator to believe that he will fulfil them; then, although the proof of these trusts depends on verbal evidence only, the Court will compel the devisee or legattee to give discovery of what passed, and will not allow him to keep the property. Therefore, if the trusts so declared are lawful, the Court will compel their execution in favour of the objects named. But if the trusts are unlawful, such as a charitable trust of land, the Court will hold that a resulting trust arises for the heir-at-law. In like manner, if a person requests his heir-at-law or next of kin to perform a trust in consideration of his allowing property to devolve upon them, and they by assent or silence induce the person in question to die intestate, the trust will be enforced. (Lewin, Ch. v. s. 3, § 8-17.)

Q.—9. Testator by will directs that his debts be paid, and gives pecuniary legacies, and gives his residuary personalty to A., his executor (who proves), and devises his realty to B.

The personalty is probably insufficient for debts.

A legatee desires to obtain the best judgment for administration to which he is entitled.

State the terms of such judgment, and particularly whether plaintiff is entitled to have it extended to realty, and if so, on what grounds.

A.—The judgment would direct the ordinary accounts of the personal estate, and direct it to be applied in paying the testator's debts, and then the legacies given by his will, and would go on to say that if the personalty wss insufficient to pay the debts and legacies, then not only should the deficiency of the debts be raised out of the real estates, but also the legatees were entitled to stand in the place of the creditors against the real estate, to the extent that such creditors had exhausted the personal estate. It would then go on to direct inquiries as to the real estate, and give directions for raising the amount required to pay the debts and make good the personal estate. (Compare Seton, 4th ed. 981; and see next question.)

REVIEWS.

PRINCIPLES OF THE LAW OF TORTS, OR, WRONGS INDEPENDENT OF CONTRACT. First American from Second English Edition, by Arthur Underhill, M. A., of Lincoln's Inn, &c., with American Cases by Nathaniel C. Moak, Counsellor at Law, Albany, N. Y. William Gould & Son, 1881.

Mr. Underhill, though an Equity and Conveyancing Counsel, produced a work on Torts that filled a void, inasmuch as it dealt with principles apart from illustrations; that is, a rule of law was stated, and a few well-selected cases, carefully digested, were added, which, within the limits of the work, sufficiently illustrated the rule. This was found admirably suited to the requirements of students, and often as a handy book to the practitioner; and its value is proved by having now gone through three editions in England. The object of Mr. Moak has been to supplement the labours of the English editor for the benefit of practising lawyers in various States of his own country, with their differing laws. Situated as we are, it is obvious that a careful selection of United States decisions must often be of great use to us in Canada, where the circumstances, climate, habits and incidents of life are necessarily somewhat similar. The editor has in the work before us simply reprinted the text of Mr. Underhill's book, and added to it as part of the text, but within brackets, statements of the law in his own country, with appropriate reference to cases illustrating the propositions laid down. We are hardly competent, from want of familiarity with the state of the law across the border, to form an opinion as to whether this has been well done; but at least judging from the remarks of legal journals that should be able to form an opinion, we fancy it has; we

can at least testify to the amount of information given. The index is very full, and adds largely to the value of the book, which is well printed and in a readable shape.

A NEW LAW DICTIONARY AND INSTITUTE OF THE WHOLE LAW, by Archibald Brown, of the Inner Temple, Barrister, &c. Second Edition. London: Stevens & Haynes, Bell Yard, 1880.

Mr. Brown is well-known to the profession in connection with his edition of Snell's Equity, and a short treatise on the law of Fixtures, &c. The second edition of his Law Dictionary was rendered desirable by reason of the passing of the Judicature Act and other changes in the law. It seems very complete as regards the number of titles referred to, containing *les termes de la ley* in all its branches, Equity, Common Law, Roman, International, Constitutional, Parliamentary, &c., including the maxims, in fact a great mass of information on a variety of subjects, in an accessible form. Its main feature is brevity; with this is combined accurate completeness. One is astonished to see how much information can be compressed into such a comparatively small compass. The author, we remark, cites largely from the reports in giving his definitions, and does not fail to give the authority, so that for the purpose intended some of the titles are in the nature of a digest. A most useful thing is a good law dictionary, and no library can be complete, nor can any student comfortably or profitably carry on his studies without having one at hand to refer to. The general reader will also often turn with advantage to its pages.

This law dictionary has been very favourably received in England, and is a credit to both author and publisher.

CORRESPONDENCE.

Master and Servants Act—Appeal.

To the Editor of the CANADA LAW JOURNAL:

SIR,—In a case recently tried at Peterborough under the Master and Servants' Act, the learned Judge of the Division Court, on the appeal to him from an order of Justices of the Peace for payment of wages, held that the service of notice of appeal upon the solicitor who appeared for the servant before the magistrates was not sufficient, and dismissed the appeal He held that notice should have been served upon the respondent personally, although it was clearly proved to the satisfaction of the Judge that every effort had been made to effect personal service, but that the respondent had disappeared from the neighbourhood on the day of the trial before the magistrates and could not be found. If this decision be correct, then the Legislature had better patch up the Division Courts Act of 1880 by restoring the practice as to service of notice of appeal to what it was under the Dominion Act of 1870, which provided for service upon the Magistrate. Otherwise, servants who have obtained orders for payment from ignorant or prejudiced magistrates can easily avoid an appeal by keeping out of the way for four days, leaving their solicitor to manage the business for them. A serious feature in the case referred to is that the solicitor who appeared at the first trial for the servant appeared on the appeal for the magistrates, and took the objection to the notice.

Yours, etc.

E.

LATEST ADDITIONS TO OSGOODE HALL LIBRARY.

APPLICATION OF PAYMENTS.—A Treatise on the Application of Payments by debtor to creditor; being a complete compilation of the law pertaining to the rights of debtor and creditor respectively; and also giving the various rules for the guidance of the courts when no appropriation has been made by the parties. By George G. Munger, late Judge of Munroe County, New York. Baker, Voorhis & Co., New York, 1879.

CRIMINAL LAW.—Principles of the Criminal Law. A concise exposition of the nature of crime, the various offences punishable by the English Law, the law of criminal procedure, and the law of summary convictions; with table of offences, their punishments and statutes; tables of cases, statutes &c., by Seymour F. Harris, B. C. L., M.A. (Oxon.) author of "A concise Digest of the Institutes of Gaius and Justinian." Second edition, revised by the author, and F. P. Tomlinson, M.A., London. Stevens & Haynes, 1881.

INDEX.—An Index to the Virginia Reports from Jefferson to 33rd Grattan, both inclusive, with a complete table of cases. By William B. Martin, of the Norfolk (Va.) Bar. J. W. Randolph & English, Richmond, Va, 1881.

STOCKS, BONDS, &C.—Law relating to Stocks, Bonds, and other securities, in the United States, by Francis A. Lewis, Jr. of the Philadelphia Bar. Rees, Welsh and Co., Philadelphia, 1881.

WILLS.—A Treatise on Wills, by Thomas Jarman, Esq., in three volumes. Fifth American, from the fourth London edition, with notes and references to American decisions. By Joseph F. Randolph and William Talcott, of the New Jersey Bar. F. D. Linn & Co., Jersey City, N. J., 1880.

TABLE OF REFERENCE

To Cases Noted and Reported in this Volume which Illustrate the Practice under the Ontario Judicature Act.

This table is intended to furnish an easy means of reference to the English and Canadian cases bearing on the present practice of our Courts, which have been noted and reported in the "Notes of Cases" and "English Practice Cases" in the Law Journal since September 1st, 1881. The first column indicates the number of the section or rule which is illustrated by a particular case (the rules being designated throughout by their marginal numbers) and the second column indicates the page in which the case in question is to be found

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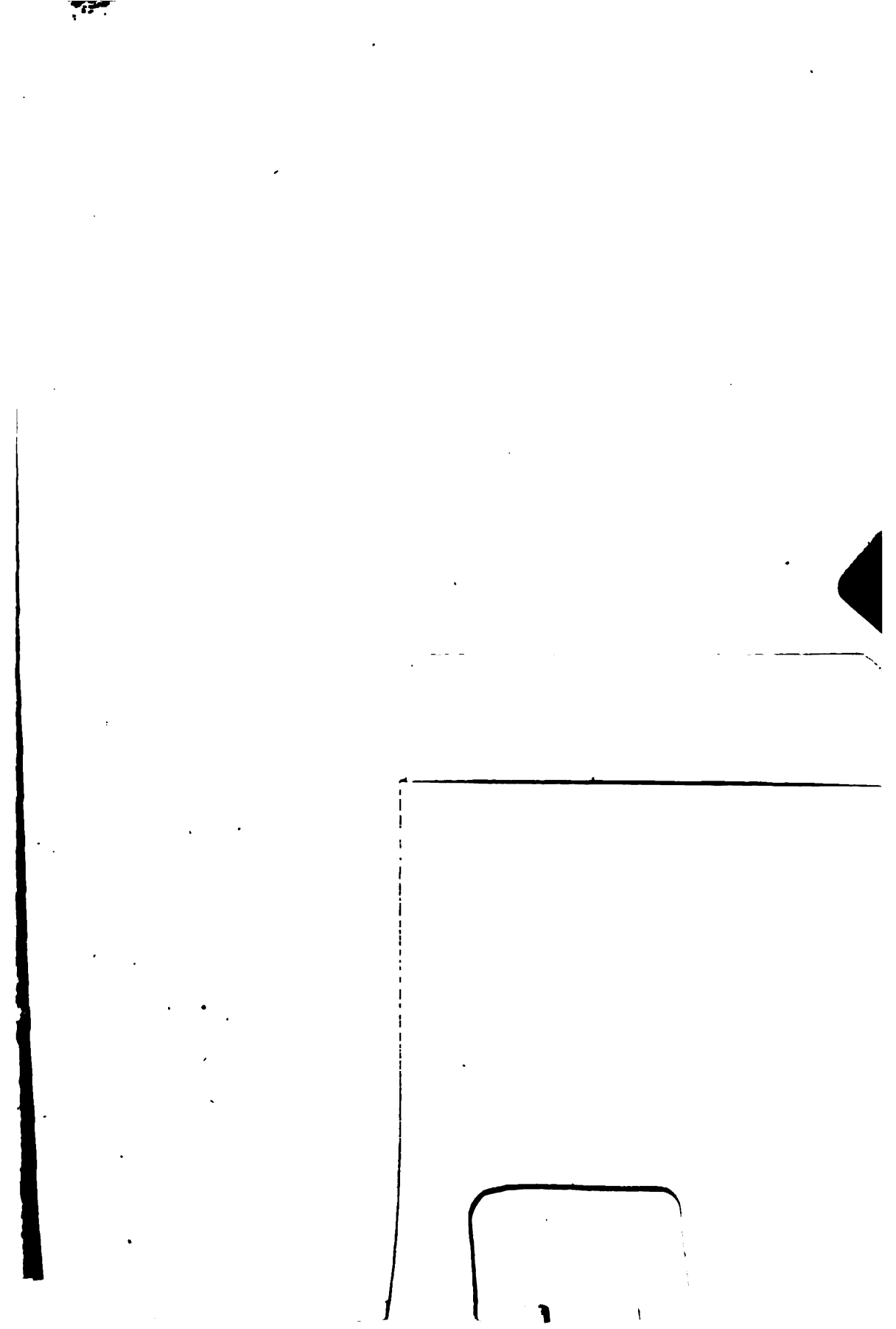
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